Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Have the Petitioners been deprived of their rights, under the United States Constitution, to due process and equal protection of law by the decision of the Supreme Court of Ohio barring them from access to Ohio's courts for the enforcement of a final judgment, including remedial orders, entitling Petitioners to affirmative relief?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are public school pupils, parents, teachers, school administrators, school boards, and school board members, who were plaintiffs in a successful challenge to the constitutionality of Ohio's public school funding system.

The specific Petitioners include: Dale R. DeRolph, parent and next friend of Nathan DeRolph; Randy Miskell; the Board of Education of the Northern Local School District; J. Kenneth Miller; Steven Johnson; Keely Thompson, parent and next friend of Christopher Thompson; Joseph Winnenberg; the Board of Education of the Southern Local School District; Louis Altier; Carol Spangler; Donna Blankenship, parent and next friend of Jami Blankenship; Mark Semanco; the Board of Education of the Dawson-Bryant Local School District; Carl Swartzwelder; Wayne White; David Bowers, parent and next friend of Christopher Bowers; Jon Carver; the Board of Education of the Lima City School District; James Eaton; Charles Buroker; Marion Gary Southers, Jr., parent and next friend of Sherri Southers and Brian Southers; Robert Rios; the Board of Education of the Youngstown City School District; Socrates Kolitsos; and Emanuel Catsoules. The foregoing Petitioners are collectively referred to herein as the "*DeRolph* Plaintiffs."

Additionally, the Ohio Coalition for Equity & Adequacy of School Funding, a duly constituted regional council of governments whose mission is to ensure a constitutional system of public school funding in Ohio, is also a Petitioner.

Judge Linton D. Lewis, Jr. and the Court of Common Pleas of Perry County, Ohio are not Petitioners.

Respondent

Respondent is the State of Ohio ("State").

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment rendered in this case by the Supreme Court of Ohio.

OPINIONS BELOW

The decision advanced for review is reported at *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (2003) ("*Lewis*") (App. 1a-15a). That decision is an outgrowth of four previous decisions of the Supreme Court of Ohio, each holding Ohio's public school funding system unconstitutional, in violation of Section 2 of Article VI of the Ohio Constitution. Those decisions, in order of issuance, are reported at *DeRolph v. State,* 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) ("*DeRolph I*"); *DeRolph v. State,* 78 Ohio St.3d 419, 678 N.E.2d 886 (1997) ("*DeRolph I* on reconsideration"); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) ("*DeRolph II*"); *DeRolph v. State*, 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) ("*DeRolph III*"); *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) ("*DeRolph IV*") (App. 17a-46a).

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered its final judgment granting the State of Ohio's complaint for writ of prohibition on May 16, 2003. Petitioners respectfully invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution (App. 51a), which provides in relevant part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Section 2 of Article VI of the Ohio Constitution provides in relevant part as follows: "The general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state . . . ." (App. 52a). In 1991, the *DeRolph* Plaintiffs initiated a lawsuit in the Perry County Court of Common Pleas ("trial court") against the State of Ohio and its educational agencies challenging the constitutionality of Ohio's elementary and secondary public school funding system under this and other provisions of the Ohio Constitution. The *DeRolph* Plaintiffs asserted that an overreliance on revenue from local property taxation had yielded profound inequities across Ohio's school districts in everything from school facilities to supplies and curriculum, resulting in constitutionally inadquate levels of educational opportunity being available to many of Ohio's public school pupils. The complaint sought a declaration that Ohio's system of funding public education was unconstitutional and injunctive relief requiring the State to remedy the unconstitutional shortcomings in the system. In an unreported

decision, the trial court declared in July of 1994 that Ohio's school funding system violated the Ohio Constitution, and the court issued remedial orders. (App. 80a-88a).

After a reversal by the appellate court, the Supreme Court of Ohio confirmed on March 24, 1997 that the State had failed in its constitutional duty to provide a thorough and efficient system of public education. *DeRolph I.* Citing "overwhelming" evidence that Ohio's schools "desperately lack the resources necessary to provide students with a minimally adequate education," the Supreme Court of Ohio declared Ohio's system of funding public schools unconstitutional. *Id.* at 197, 210.[1] The court directed that "Ohio's public school financing scheme must undergo a complete systematic overhaul" and ordered the legislature to eliminate four specific elements of the funding system "which contribute to the unworkability of the system." *Id.* at 212.[2]

The Supreme Court of Ohio stayed the effective date of its decision to permit the enactment of remedial legislation. The case was remanded to the trial court to conduct a hearing and issue findings as to whether the anticipated remedial

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[1] The court concluded that schools were "starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *DeRolph I* at 205.

[2] The factors identified were: "(1) the operation of the School Foundation Program, (2) the emphasis of Ohio's school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings." *DeRolph I* at 212.

legislation satisfied the mandates of the Supreme Court of Ohio. After an evidentiary hearing in the fall of 1998, the trial court concluded that the State had failed to comply with the *DeRolph I* mandates. *DeRolph v. State*, 98 Ohio Misc.2d 1, 712 N.E.2d 125 (1999). Accordingly, the trial court ordered the State to undertake specific steps to remedy the continuing constitutional infirmities in Ohio's school funding system. *Id.* at 263.

The State immediately appealed the trial court's decision directly to the Supreme Court of Ohio, as authorized in *DeRolph I* on reconsideration. On May 11, 2000, the Supreme Court of Ohio concurred with the determination of the trial court and again declared that the State remained in violation of its constitutional mandate to provide a thorough and efficient system of public schools. *DeRolph II.* The court reiterated its earlier remedial order that the General Assembly undertake a "complete systematic overhaul" of school funding. *Id.* at 17. Additionally, the court explained and clarified its earlier remedial orders, expanding to seven the list of elements within the funding system that required attention from the legislature. *Id.* at 37.[3] The court again stayed the effective date of its decision, this time retaining

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[3] The areas requiring scrutiny and further action by the legislature were: (1) the continued overreliance on local property taxes as a primary means to fund Ohio's schools; (2) structural deficiencies in the basic aid formula; (3) "the mechanism implemented to fund the construction of new school facilities and to repair older, decaying school buildings, until the task is complete"; (4) reevaluation of the legislatively enacted School Solvency Assistance Fund; (5) the necessity to address and immediately fund "unfunded mandates"; (6) the elimination of "[t]he phenomenon known as phantom revenue"; and (7) the development and rigorous enforcement of "[s]trict, statewide academic guidelines." *DeRolph II* at 37.

jurisdiction to review the legislation enacted in response to its remedial orders.

On September 6, 2001, the Supreme Court of Ohio issued its third *DeRolph* decision, again holding that the State had failed to provide a school funding system compliant with the Ohio Constitution. *DeRolph III*. The court indicated that the legislation presented for review "would be" constitutional if the State made certain specific changes to the school funding formula. *Id.* The State, however, moved for reconsideration. The State's motion was granted, and in lieu of a decision on the merits of reconsideration, the court ordered the parties to mediation. *DeRolph v. State*, 93 Ohio St.3d 628, 758 N.E.2d 1113 (2001). The mediation effort failed, and the case was returned to the court's active docket for decision on reconsideration.

On December 11, 2002, the Supreme Court of Ohio issued *DeRolph IV*, wherein it reiterated for the fourth time that "the current school-funding system is unconstitutional." *DeRolph IV* at 435 (App. 19a). The court vacated *DeRolph III* and declared *DeRolph I* and *II* as the law of the case. *Id.* The court's remedial order was comprehensive: "we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences." *Id.*

The Supreme Court of Ohio neither stayed the effective date of its *DeRolph IV* decision nor reserved ongoing jurisdiction over the case. On the same day as the decision, the court issued its judgment entry that Ohio's public school funding system is unconstitutional and issued a mandate commanding the trial court to carry the judgment into execution. (App. 47a-50a).

After December 11, 2002, the State continued the operation of Ohio's public schools under the same system of laws declared unconstitutional by the Supreme Court of Ohio in *DeRolph IV*. On March 4, 2003, the Petitioners filed a motion for compliance conference in the trial court. (App. 61a-79a). The purpose of the request for a conference was to ascertain when and how the State intended to comply with the Supreme Court of Ohio's *DeRolph IV* orders and the prior directives of the trial court. *Id.* The State responded by filing an original action in the Supreme Court of Ohio requesting a writ of prohibition to bar the trial court from entertaining Petitioners' motion. Petitioners moved to intervene in the prohibition action, which motion was granted. (App. 16a).

Petitioners also filed an answer to the State's complaint in the Supreme Court of Ohio asserting, among other defenses, that the order sought by the State would violate Petitioners' rights to due process of law as secured by the United States Constitution. (App. 58a). Petitioners thereby timely and properly raised federal constitutional questions at their first and only opportunity to respond to the writ of prohibition that is the subject of this petition for writ of certiorari. The federal constitutional questions were not expressly passed upon by the Supreme Court of Ohio.

On May 16, 2003, without further hearing, briefing, or argument, the Supreme Court of Ohio rendered its decision and entered a judgment granting the State's request for a writ of prohibition against the trial court. *Lewis* (App. 1a-15a).[4] The court stated that "we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State.*" *Id.*

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[4] Reference in this Petition to "*Lewis*" includes both that decision and the writ of prohibition issued in connection with it.

at 104 (App. 13a). The court thus not only prohibited the trial court from conducting the status conference sought by Petitioners but additionally foreclosed Petitioners from access to *any* of the courts of Ohio in connection with *DeRolph*. Petitioners here seek review of *Lewis*.

REASONS FOR GRANTING THE WRIT

Ohio's 1.8 million public school pupils receive their education under a system of school funding laws that has now been declared unconstitutional by the Supreme Court of Ohio on four separate occasions. The declarations of unconstitutionality, and the accompanying remedial orders, are sweeping in scope, portending changes that likely exceed in reach and significance anything ever before mandated by that court. Those remedial orders are now empty promises.

Six years ago, in its first decision in the case, the Supreme Court of Ohio acknowledged the vast implications of its undertaking:

> Today, Ohio stands at a crossroads. We must decide whether the promise of providing to our youth a free, public elementary and secondary education in a "thorough and efficient system" has been fulfilled. The importance of this case cannot be overestimated. It involves a wholesale constitutional attack on Ohio's system of funding public elementary and secondary education. Practically every Ohioan will be affected by our decision: the 1.8 million children in public schools and every taxpayer in the state. For the 1.8 million children involved, this case is about the opportunity to compete and succeed.

DeRolph I at 197. The remedial orders issued in *DeRolph I* and its progeny potentially reach every classroom, every teacher, and every student in the state. By rights, the *DeRolph* orders should alter forever the educational landscape in Ohio.

But in *Lewis*, the separate action here in issue, the Supreme Court of Ohio abruptly cut off Petitioners' access to Ohio's judicial system, invoked for the purpose of securing implementation of the remedial orders.

Lewis violates fundamental principles of federal constitutional law. The Due Process Clause of the Fourteenth Amendment does not permit *Lewis*' deprivation of the right of access to the courts, nor does it permit the consequent deprivation of the remedy ordered by the state's highest court for the declared violations of law. *Lewis* cannot be reconciled with historical traditions or notions of ordered liberty. Moreover, by depriving Petitioners of rights accorded all other litigants in Ohio, *Lewis* offends basic principles of equal protection.

Just as the momentous rulings in *DeRolph* were without parallel in Ohio, so, too, is *Lewis*' deprivation of the remedies decreed in that case. The breadth and manner of the deprivation wrought by *Lewis* call into question the continued vitality of the rule of law in Ohio and beyond.

I. THE SUPREME COURT OF OHIO HAS CONCLUSIVELY DETERMINED THAT PETITIONERS HAVE ENFORCEABLE RIGHTS TO EDUCATION UNDER THE OHIO CONSTITUTION, THAT THOSE RIGHTS ARE BEING VIOLATED, AND THAT PETITIONERS ARE ENTITLED TO RELIEF.

At the outset, and in order to clarify what is and is not in issue in this case, it may be helpful to identify the two distinct levels of this controversy. The first level concerns the educational entitlement of Ohio's school children pursuant to the Ohio Constitution. This is a matter of state law and has already been decided by the Supreme Court of Ohio in *DeRolph*.[5] As a result, it is now settled law that the education clauses of the Ohio Constitution are not merely aspirational; rather, they create substantive entitlements on the part of Ohio's children and corresponding enforceable obligations on the part of the State. It is also absolutely settled that the State has neglected its obligation and that the laws that presently compose the State's school funding system are unconstitutional. Finally, the Supreme Court of Ohio, having repeatedly declared both of the foregoing, has also issued a series of remedial orders directing comprehensive reform of the unconstitutional system. All of the aforementioned issues are settled matters of state law, and the instant petition does not require this Court to examine any of them independently.[6]

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[5] "*DeRolph*" is generally used herein to refer collectively to *DeRolph IV* and the two earlier decisions reinstated by *DeRolph IV* (*DeRolph I* and *DeRolph II*).

[6] Accordingly, this case does not require the application or reconsideration of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

The second level of this controversy stems from the unprecedented action of the Supreme Court of Ohio in *Lewis*, a decision that, with but a single stroke, aborted the *DeRolph* litigation prior to the Petitioners ever having achieved *any* remedy for the violations declared in *DeRolph IV*.[7] It is this second level of this controversy that brings Petitioners to this Court.

The Supreme Court of Ohio's action in *Lewis* is wholly without precedent under Ohio law, and it is a shocking affront to rights protected by the Due Process Clause of the federal constitution. When a final judgment declares that a party has been wronged and provides remedial orders, the prevailing party has an enforceable right to the remedy so ordered. The duty of the courts to require compliance with such orders (even when directed at the other branches of government) is firmly established as a fundamental imperative in both the federal and Ohio systems of jurisprudence.

Consistent with the foregoing, in *DeRolph I*, the Supreme Court of Ohio emphatically rejected the argument that a constitutional challenge to the State's school funding system presented a nonjusticiable political question. "We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial arbiters and to

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[7] Although, as the State argued below, Petitioners could commence a *new* lawsuit aimed at vindicating educational rights, such a suit could not redress the ongoing deprivation of the remedy to which the school children are *presently* entitled, under *DeRolph IV*. Moreover, unless *Lewis* is reversed, a new suit could not yield anything more than Petitioners already have obtained – a comprehensive declaration of rights, with corresponding remedial orders, all of which are completely unenforceable.

pass our responsibilities onto the lap of the General Assembly." *DeRolph I* at 198. Thereafter, the court continued to issue remedial orders, and it expressly confirmed that a remedy for the constitutional violations repeatedly identified by the court would be enforced. *DeRolph II* at 12 ("[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity.").

The Supreme Court of Ohio never wavered in *DeRolph* from its resolve that it not only had the power but the duty to require the State to reform the unconstitutional funding system. In its final *DeRolph* decision, the court vacated *DeRolph III*, which represented a constriction of its earlier, more comprehensive remedial decrees, and reinstated those earlier decrees as follows:

> [T]he General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

DeRolph IV at 435 (citations omitted) (App. 19a).[8]

The vigor with which the parties and the court (including dissenting justices) addressed *DeRolph* throughout the decade of that litigation evidenced their common understanding that *DeRolph* was not a mere academic exercise. All understood that the case would, at the end, have legal and practical consequences of unparalleled magnitude. Nothing in the history of Ohio jurisprudence, generally, or *DeRolph*, in particular, foreshadowed *Lewis*' sudden and anomalous divestment of the *rights already declared and the relief already ordered* in *DeRolph IV*.

II. *LEWIS*' EXTRAORDINARY PROHIBITION OF JUDICIAL INVOLVEMENT IN THE ENFORCEMENT OF *DEROLPH*'S REMEDIAL DECREES DEPRIVES OHIO'S 1.8 MILLION SCHOOL CHILDREN OF PARAMOUNT INTERESTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. *Lewis* Deprives Petitioners Of Their Right To Access Ohio's Courts.

The Due Process Clause of the federal constitution protects Petitioners' right to invoke the processes created by state law for the enforcement of remedial orders. *Lewis*'

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[8] *Lewis* did not modify the scope of *DeRolph IV* but in fact confirmed it. *Lewis* at 100 (App. 5a). In the five months separating *DeRolph IV* and *Lewis*, there were no statutory changes and no decisions of the Supreme Court of Ohio or the federal courts of relevance. The only change was in the composition of the Supreme Court of Ohio.

summary and arbitrary deprivation of this right cannot be reconciled with the Due Process Clause.

Under Ohio law, when a superior court issues remedial orders but declines to retain continuing jurisdiction, as the Supreme Court of Ohio did in *DeRolph IV*, the power to oversee enforcement of the remedy reverts to the trial court as a matter of course. Among the sources for such jurisdiction is Section 4, Article IV of the Ohio Constitution, which grants original jurisdiction to common pleas courts (i.e., trial courts) over "all justiciable matters . . . as may be provided by law." Additionally, Ohio's Declaratory Judgment Act specifically confers upon any court of record the power to grant further necessary or proper relief where, as here, a declaratory judgment has been entered. Ohio Rev. Code Ann. Chapter 2721; Ohio Rev. Code Ann. § 2721.09. Not surprisingly, the rules of procedure applicable to Ohio's trial courts include a counterpart to Fed. R. Civ. P. 70,[9] which has long been used by the federal courts to enforce a wide variety of judgments, including those mandating large-scale institutional reform.[10]

The mandate sent to the trial court following *DeRolph IV* (commanding the trial court to "proceed without delay to

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[9] Staff Notes to Ohio Rules of Civil Procedure 70 indicate that the wording of this rule is virtually identical to that of its federal counterpart. Ohio Rev. Code Ann., Rules of Court, Civil at 801 (West 1994).

[10] *See Morales Feliciano v. Hernandez Colon*, 771 F.Supp. 11, 12-13 (P.R. 1991) ("Rule 70 'gives the courts ample power to deal with parties who seek to thwart judgments by refusals to comply with orders to perform specific acts.' . . . The rule also has been relied upon by courts to effectuate judgments in public reform litigation.").

carry the [judgment] in this cause into execution" (App. 49a)), and Petitioners' subsequent motion to that court for a status conference (seeking only judicial oversight of the reform process), are consistent with the foregoing sources of Ohio law, as traditionally implemented by Ohio's judiciary. *Lewis*' obstruction of the enforcement of a validly rendered and presently effective judgment (and accompanying remedial orders) is a singular aberration.

This Court historically has recognized that the federal constitution protects access to the judicial processes established by the states. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court noted that it "traditionally has held that the Due Process Clauses [of the Fifth and Fourteenth Amendments] protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. The protection emanates from the understanding that the Due Process Clause creates a constitutionally protected interest in access to a forum created by the state for such purposes. *See id.*[11]

This Court has indicated that whether or not access to the civil courts of the states is constitutionally protected depends upon the significance of the underlying interest sought to be adjudicated. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Here, the educational interests at stake are vital – both to the children who have been deprived of them and to the society

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[11] In addition to the Due Process Clause of the Fourteenth Amendment, the Court has derived the right of access to the courts from a variety of other constitutional provisions, including the Article IV Privileges and Immunities Clause, and the First, Fifth, and Fourteenth Amendments. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

those children ultimately must sustain. As the Court recently observed, "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter v Bollinger*, 123 S.Ct. 2325, 2340 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). *Accord Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."). Similarly, in 1974 the United States Congress declared education to be a matter of national interest:

> Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.

20 U.S.C. § 1221-1.

The constitutional significance of the right to public education was underscored in *Goss v. Lopez*, 419 U.S. 565 (1975), in which this Court found that depriving a single student of ten days of education was sufficiently consequential to require the protections of due process. How, then, can *Lewis* constitutionally deny Petitioners access to the judicial processes of the state, which processes offer the only means by which Petitioners may vindicate educational rights of countless students who otherwise must continue *into a second decade* to suffer educational deprivation of declared constitutional proportions?

By prohibiting Ohio's courts from the exercise of the jurisdiction they would otherwise use to enforce declared educational rights, *Lewis* has inflicted a deprivation of paramount interests, in violation of the federal constitution.[12]

B. The Right To A Previously Ordered Remedy Has Historically Been Protected By The Federal Courts And Is Implicit In The Concept Of Ordered Liberty.

Lewis' denial of Petitioners' federally-protected right of access to Ohio's courts works a complete deprivation of the remedy to which *DeRolph IV* entitles Petitioners. That deprivation of a remedy is itself an independent violation of rights protected by the federal constitution.

The federal courts historically have recognized, as an essential and fundamental underpinning of our legal system, the rights of successful litigants to rely upon, obtain the benefits of, and compel compliance with, the judgments awarded them. When *Lewis* closed the courthouse doors to Petitioners, it deprived them of these rights, stripping *DeRolph IV* of any practical effect and Ohio's school children of legally protected rights, as already adjudicated, in violation of substantive as well as procedural due process.

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[12] *Cf. Barry v. Barchi*, 443 U.S. 55 (1979) (protected interest in horse trainer's license); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (protected interest in utility service); *Bell v. Burson*, 402 U.S. 535 (1971) (protected interest in driver's license).

Although members of the Court have at times urged varying approaches to substantive due process, the Court generally requires, as an initial matter, that the interests asserted to merit such protection be described with care and specificity; the Court has then examined such interests to determine whether they are both "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" and "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *see also Chavez v. Martinez*, 123 S.Ct. 1994 (2003) (Thomas, J., concurring).

Applying the foregoing to the instant case, Petitioners' interest in securing, through customary state processes, the remedy granted them by *DeRolph IV* – and blocked by *Lewis* – unquestionably qualifies for the protections of substantive due process. Beginning, as *Glucksberg* counsels, with a careful description of the interest asserted, it is critical that Petitioners' interest is not a mere abstract "right to a remedy" but a right to the particular remedy *already ordered* by the highest court of Ohio.

The specific characteristics of the interests denied by *Lewis* are compelling. In substantive terms, the interests concern the educational rights of millions of current and future school children. The entitlement denied them is created by the Ohio Constitution, the supreme law of Ohio. The inadequacies in the school funding laws are so pervasive that the Supreme Court of Ohio has declared those laws "inherently incapable of achieving their constitutional purpose." *DeRolph I* at 212. The continued operation of these laws exposes children to physical danger as well as to the lifelong consequences of educational neglect, impoverishing them physically, intellectually, and economically. This deprivation not only condemns them to

lives of diminished potential, but it also negatively affects the welfare of the entire state and nation.

In procedural terms, the Supreme Court of Ohio has recognized and declared all of the foregoing. It has acknowledged its duty to provide a remedy and its authority to enforce its orders. It has repeatedly issued remedial orders requiring comprehensive reform and providing specific direction regarding the nature of the reform.[13] There has been no compliance whatever with *DeRolph IV*, and the harm to Ohio's children is ongoing.

It is in this specific context that Petitioners assert that the fruits of *DeRolph* are protected by procedural and substantive due process. The idea that a party may litigate rights of this magnitude for a decade, repeatedly emerge the victor, be the beneficiary of remedial orders issued by the highest court of the state, and then summarily be barred from enforcing the judgment in its favor is wholly inconsistent with notions of ordered liberty and the rule of law.

The entitlement to a remedy for a legal wrong in circumstances such as these is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 702. As early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court recognized that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded'" unless, as in *Marbury*, the courts lack jurisdiction over the dispute, which clearly is not the case here. *Id.* (quoting 3 William Blackstone, Commentaries *23). The Supreme Court of Ohio has expressly and forcefully

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[13] *See supra* footnotes 2 and 3, and *DeRolph IV* at 435.

recognized that the *DeRolph* dispute is within the jurisdiction, and subject to the remedial powers, of the courts.

In cases involving interests far less vital than those asserted here, and affecting far fewer people, this Court has evaluated remedies according to the Due Process Clause.[14] In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), for example, the Court found prospective relief alone inadequate to vindicate rights violated by a state tax law. By comparison, in this case (in which retrospective relief has never been sought), *Lewis* operates to perpetuate ongoing educational deprivation on a statewide scale, eliminating any consequences for the violators and foreclosing *any* means of relief for the victims. Absent the intervention of this Court, *Lewis*' deprivation of Petitioners' federally protected right to a remedy for the violations of legal rights declared in *DeRolph IV* is complete.[15]

Moreover, *Lewis'* sudden and extraordinary prohibition of the enforcement of remedies earlier and repeatedly ordered is reminiscent of the "bait-and-switch" scheme condemned by

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[14] Even a legal claim not yet reduced to judgment has been accorded protection as a property interest. *Logan*, 455 U.S. at 428-29 (holding that a cause of action is a protected property interest); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 804 (1996) (describing a chose in action as "a protected property interest in its own right").

[15] *Cf. Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.").

this Court as violative of due process in *Reich v. Collins*, 513 U.S. 106 (1994).[16] Here, Petitioners litigated *DeRolph* for an additional six years after the Supreme Court of Ohio first declared, in *DeRolph I*, that constitutional rights to education were justiciable and enforceable, and issued the first in a series of remedial orders. Subsequent proceedings were in reliance upon the consequent expectation of an enforceable remedy at the conclusion of the liability phase of the *DeRolph* litigation.

Neither the systemic nature of *DeRolph*'s remedial orders nor the refusal of the State to comply with them is a compelling reason to divest the school children of their entitlement to a remedy. This Court has unequivocally rejected the notion that a state or local government may refuse to comply with judicially ordered remedies.[17] In the school desegregation cases, faced with the same kind of institutional intransigence (and with similar interests at stake), this Court approved the exercise of judicial authority to compel

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[16] "[D]ue process requires a 'clear and certain' remedy for taxes collected in violation of federal law. A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do, and what Georgia did here, is hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich* at 108 (citations omitted); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[17] While the cases referenced in support of this proposition concern federal court enforcement of federal court orders, the principles underlying the cases apply with equal force in the context of state courts, likewise requiring those courts to act to enforce their own remedial decrees.

compliance with remedial decrees. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 15 (1971) ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").[18] Moreover, the remedial authority of the judiciary takes on heightened importance where, as here, there are *ongoing* violations of declared rights. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978).

Remedial decrees impose significant obligations on those to whom they are directed. In the desegregation cases, faced with requests for the dissolution of remedial decrees and the withdrawal of judicial supervision after decades of reform efforts by formerly segregated school systems, this Court has indicated that there must first be a showing of good faith compliance with the decrees for a period of time sufficient to eliminate the "vestiges of past discrimination . . . to the extent practicable." *Board of Ed. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991); *see also Freeman v. Pitts*, 503 U.S. 467 (1992). By comparison, in the instant case there has never been *any* compliance with *DeRolph IV*, and the constitutional violations for which Petitioners seek a remedy are *present* ones. The issue is not whether a remedy thus far provided is sufficient; no remedy of any kind has ever been provided in response to *DeRolph IV*. Indeed, at the time *Lewis* was issued, a mere five months after *DeRolph IV*, the State was brazenly continuing, as it still does, to operate the

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[18] This Court has even acknowledged the power of the judiciary to order that taxes be levied when necessary to remedy adjudicated wrongs. *Missouri v. Jenkins*, 495 U.S. 33, 55 (1990).

very same school funding system that had *four times* been declared unconstitutional.

The question thus presented to this Court is not one of degree. Instead, the question is whether litigants may, consistent with procedural and substantive due process, be cut off from *any remedy whatsoever* for ongoing wrongs that have already been judicially declared and accompanied by remedial orders. The Due Process Clause is implicated not simply because the State has refused to comply with *DeRolph IV*, but because *Lewis* flatly held that litigants may be barred from applying to the courts to secure the enforcement of binding judicial decrees.

Lewis stands "ordered liberty" on its head, enabling Ohio's legislative and executive branches to continue to knowingly violate the law while affirmatively *prohibiting* Ohio's courts from enforcing compliance with the law. The lawless methodology of *Lewis*, the unconstitutional harm it knowingly inflicts on a powerless and dependent class of victims, and the fact that *Lewis* emanates from the highest level of the very branch of state government most charged with, and relied upon for, the protection of such victims is beyond understanding or excuse.[19]

Finally, in addition to analyzing substantive due process claims in terms of historical notions of ordered liberty, this

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[19] *See United States v. Wallace*, 218 F. Supp. 290, 292 (N.D. Ala. 1963) ("In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.").

Court at times has evaluated challenged state action in terms of a "shocks the conscience" standard. *See generally Chavez*, 123 S.Ct. 1994. In this regard, if *Lewis* is not "conscience shocking," it is difficult to conceive of any governmental conduct that would merit such description. While this Court has variously employed – and sometimes questioned, as lacking clear parameters – both the shocks-the-conscience and implicit-in-ordered-liberty approaches to substantive due process (*see generally id.*; *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998)), this is not a case that tests the outer limits of either approach. However analyzed, the manner and impact of the deprivation wrought by *Lewis* violate the Due Process Clause.

C. *Lewis'* Unprecedented Deprivation Of The Right To Enforce Remedial Decrees Is A Violation Of Equal Protection.

This Court has recognized that when a state creates a judicial process, it may not grant the benefits of that process to some litigants and deny it to others without implicating the often-intertwined issues of equal protection and due process. *See generally M.L.B. v. S.L.J.*, 519 U.S. at 120 ("[T]he Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns."); *Griffin v. Illinois*, 351 U.S. 12 (1956), *construed in Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating

the Equal Protection Clause."); *see also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).[20]

Ohio law historically and routinely grants *all* litigants the right to seek the aid of its courts in the enforcement of judgments. *Lewis* singles out one group of claimants – those seeking enforcement of the educational clauses of the Ohio Constitution, as declared and ordered in *DeRolph* – denying them and them alone access to the judicial processes historically available to all others. *Lewis* not only lacks a compelling state interest, it lacks any proper purpose whatever. As this Court has stated in another context, "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).[21]

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[20] Concerning the relationship between due process and equal protection generally, *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.").

[21] *Cf.*, *Primes v. Tyler*, 43 Ohio St.2d 195, 205, 331 N.E.2d 723, 729 (1975) (striking down Ohio's "guest statute" on the grounds that the statute "by its grant of a special privilege and immunity to negligent drivers who injure nonpaying passengers is . . . violative of the Fourteenth Amendment to the United States Constitution, in that it denies due process of law and equal protection of the laws to the people of this state.").

Lewis deliberately and selectively excluded Ohio's most vulnerable citizens from the judicial processes available under state law to all others. In so doing, *Lewis* denied the school children the rights afforded them by Ohio's most basic law, depriving them of the education this Court has described as "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter*, 123 S.Ct. at 2340. *Lewis* is not only morally unconscionable. It also violates the fundamental promises of due process and equal protection contained in the United States Constitution.

In sum, Petitioners respectfully submit that this Court should accept review of this case in order to address significant issues of federal constitutional law, including procedural and substantive due process and equal protection of law. *Lewis* raises significant issues concerning the traditional procedural due process entitlements of litigants who seek access to the courts to vindicate important substantive rights. It also raises a broader issue of whether, consistent with substantive due process, litigants who have already established their substantive rights (and acquired remedial orders) may be denied all access to the courts, even when the courts clearly have jurisdiction to provide and enforce a remedy for the ongoing violations of such rights. Finally, *Lewis* offers an opportunity for the Court to address the important equal protection issues raised by *Lewis*' differential treatment of the school children of Ohio as compared with all other litigants in Ohio.

III. REVIEW IS WARRANTED BY THE IMPORTANT INTERESTS AT STAKE.

This Court has long recognized that public education serves the essential purpose of preparing a citizenry capable

of continuing our democracy. *See Brown v. Board of Educ.*, 347 U.S. 483. Moreover, the importance of education has grown as our nation has evolved from the industrial revolution to the information age. The demands of economic productivity and basic citizenship are increasingly complex, placing heightened demands upon our public schools.[22]

In *Grutter*, this Court approved race-based law school admissions criteria, while noting that hoped-for improvements in pre-college educational opportunities would foretell the day when such considerations would no longer be necessary.[23] Yet *Lewis* perpetuates the very disparities underlying *Grutter*'s compensatory criteria – at least for those in Ohio's flawed public schools.

This Court is no stranger to the problems of these schools. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court was given a ringside view of the deplorable conditions

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[22] Thirty years ago, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, this Court held that education is not a fundamental right for purposes of federal equal protection analysis. As noted *supra* footnote 6, the instant case does not require a re-examination of *Rodriguez*. Nevertheless, this Court may view this case as an opportunity to reconsider the fundamentality of education in a context in which children are routinely deprived of such rights and in light of the heightened contemporary importance of those rights.

[23] "As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Grutter*, 123 S.Ct. at 2364 (Ginsburg, J., concurring).

in the Cleveland City School District, Ohio's largest. The educational deprivation portrayed in *Zelman* persists, and it continues to inflict its greatest harms on those with the greatest needs, for whom public education is meant to open doors – not shut them forever. The words of Justice Thomas echo in depressed schools throughout Ohio. "[T]he promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts." *Id.* at 682. *Zelman*'s voucher program may offer escape for a few, but the vast majority of Cleveland's students continue to attend the same underfunded, failing schools condemned by the State, itself, in *Zelman*. Moreover, while *Zelman* revealed educational deprivation in Cleveland, *DeRolph* constitutes a far more comprehensive indictment of public education throughout the State of Ohio.

Remedies for systemic violations of constitutional rights by governmental agencies may be complex, time consuming, and at times unpopular, but the notion of denying any remedy whatsoever has never been tolerated. Had this Court in *Brown v. Board of Education* declared the rights of school children to attend integrated schools but deprived them of the ability to enforce that decree, there can be little doubt that segregation would have continued for decades – and perhaps forever. No less than the children in *Brown*, Ohio's children are entitled to a remedy.

There is yet a broader issue presented by this case. At the present time, numerous other states are engaged in school

funding litigation.[24] In some of those states, the legislatures have demonstrated the same unwillingness to institute court-ordered reforms as has been demonstrated in Ohio. If *Lewis* becomes the model for the nation, the formula for back-door evisceration of legal rights will be clear – recognize the constitutional right but deny judicial enforcement of a remedy for violations of those rights. Legal protections will effectively be eliminated – not by any change in the law itself but by the absence of any enforceable remedy for its violation.

While the consequences of *Lewis* are enormous when measured in the context of school funding suits, even this does not represent the full extent of the damage caused by *Lewis*. The gaping hole *Lewis* creates in the fabric of due process potentially endangers *any* fundamental right, not just those concerned with education. When basic rights are so easily denied, the rule of law has ceased to exist.

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[24] *See* Advocacy Center for Children's Educational Success with Standards (visited Aug. 12, 2003) <http://www.accessednetwork.org/states/index.htm> for the status of school funding litigation in the 50 states.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO

No. 2003-0447

Submitted April 15, 2003
Decided May 16, 2003

THE STATE EX REL.	)
STATE OF OHIO	)
	)
v.	)
	)
LEWIS, JUDGE, ET AL.	)
	)

Prohibition — Writ sought prohibiting Perry County Common Pleas Court Judge Linton D. Lewis Jr. from exercising further jurisdiction in DeRolph v. State — Writ granted.

IN PROHIBITION.

LUNDBERG STRATTON, J.

The *DeRolph* Litigation: *DeRolph I, II, III,* and IV

{¶1} In December 1991, Dale R. DeRolph and other plaintiffs, including five school district boards of education, filed a complaint in respondent Perry County Court of Common Pleas. In an amended complaint, the *DeRolph*

plaintiffs requested (1) a declaration that public education is a fundamental constitutional right in Ohio, (2) a declaration that the system of funding public education in Ohio was unconstitutional as applied to plaintiffs and others, and (3) a mandatory injunction requiring relator, the state of Ohio, to provide for a system of funding public elementary and secondary education in compliance with the Ohio Constitution. The *DeRolph* plaintiffs further requested that the common pleas court "retain jurisdiction of this matter for the purpose of assuring compliance with its lawful findings and orders." Relator, the state of Ohio, the State Board of Education, the State Superintendent of Public Instruction, and the State Department of Education were named as defendants.

{¶2} Respondent Perry County Common Pleas Court Judge Linton D. Lewis Jr. determined that Ohio's school-funding system violated the Ohio Constitution and ordered the preparation of legislative proposals for submission to the General Assembly to eliminate wealth-based disparities among Ohio public school districts. See *DeRolph v. State* (1997), 78 Ohio St.3d 193, 194, 677 N.E.2d 733. ("DeRolph I.") After the court of appeals reversed the trial court's judgment, see *DeRolph v. State* (Aug. 30, 1995), Perry App. No. CA-477, 1995 WL 557316, we reversed the judgment of the court of appeals. *DeRolph I at* 213, 677 N.E.2d 733.

{¶3} In *DeRolph I*, we held that "Ohio's elementary and secondary public school financing system violates Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state." Id. at syllabus. We refused, however, "to encroach upon the clearly legislative function of deciding what the new legislation will be." *DeRolph I*, 78 Ohio St.3d

at 213, 677 N.E.2d 733, fn. 9. Instead, we ordered the General Assembly to create an entirely new school-financing system, but stayed the effect of the decision for 12 months. Id. at 213, 677 N.E.2d 733. We remanded the cause to the common pleas court "with directions to enter judgment consistent with this opinion" and ordered that court to "retain jurisdiction until the legislation is enacted and in effect, taking such action as may be necessary to ensure conformity with this opinion." Id. We conferred plenary jurisdiction on the trial court to enforce the decision, including the right to petition this court for guidance. Id. at fn. 10.

{¶4} We subsequently clarified *DeRolph I* by stating that Judge Lewis would rule on the constitutionality of the final legislative remedy and that any party could then appeal directly to this court. *DeRolph v. State* (1997), 78 Ohio St.3d 419, 421, 678 N.E.2d 886. We further rejected any supervision of the legislative process by the courts.

{¶5} "Given the separate powers entrusted to the three coordinate branches of government, both this court and the trial court recognize that it is not the function of the judiciary to supervise or participate in the legislative and executive process. * * *

{¶6} " * * * [I]t is the role of the courts, pursuant to the Ohio Constitution, to determine the constitutional validity of the system of funding and maintaining the public schools in Ohio." Id. at 420-421, 678 N.E.2d 886.

{¶7} On remand, the *DeRolph* plaintiffs asked Judge Lewis to order the *DeRolph* defendants to follow three steps pursuant to a schedule recommended by the plaintiffs. See

DeRolph v. State (1997), 79 Ohio St.3d 297, 681 N.E.2d 424. After Judge Lewis petitioned this court for guidance on the plaintiffs' motion, we held that the *DeRolph* plaintiffs' request for the order should be denied. Id.

{¶8} In February 1999, Judge Lewis entered his judgment on the remanded case. *DeRolph v. State* (1999), 98 Ohio Misc.2d 1, 712 N.E.2d 125. Judge Lewis held that the state had not proved that its remedy complied with the court's *DeRolph I* mandate and that the school-funding system remained unconstitutional. Id. at 263, 712 N.E.2d 125. Judge Lewis retained jurisdiction to ensure compliance and ordered the State Superintendent of Public Instruction and the State Board of Education to prepare a report with proposals to comply with the orders of the common pleas court and this court, to submit the completed report to the General Assembly, and thereafter to prepare a report setting forth the steps taken to resolve the issues raised by the *DeRolph* litigation. Id. Judge Lewis's remedial order was stayed pending appeal. *DeRolph v. State* (1999), 85 Ohio St.3d 1488, 709 N.E.2d 1215.

{¶9} On appeal, we agreed that the revised school-funding system was still unconstitutional but gave the defendants more time to comply with Section 2, Article VI of the Ohio Constitution. *DeRolph v. State* (2000), 89 Ohio St.3d 1, 36-38, 728 N.E.2d 993 ("*DeRolph II*"). In so holding, however, we did not adopt Judge Lewis's 1999 remedial order. In addition, we "decline[d] to appoint a special master to oversee the state's further efforts to comply with Section 2, Article VI" and maintained continuing jurisdiction. We affirmed only those portions of the trial court's judgment that were consistent with *DeRolph II*. Id.

{¶10} In September 2001, after the state further modified the school-funding system, we ordered the state to implement certain changes that would satisfy the tests for constitutionality in *DeRolph I* and *II*. *DeRolph v. State* (2001), 93 Ohio St.3d 309, 325, 754 N.E.2d 1184 ("*DeRolph III*") We further stated that there was "no reason to retain jurisdiction" and that "[i]f the order receives less than full compliance, interested parties have remedies available to them." Id.

{¶11} On reconsideration, we vacated *DeRolph III*, held that *DeRolph I* and *II* were the law of the case, and further held that the school-funding system was unconstitutional. *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529 ("*DeRolph IV*"). We directed the General Assembly "to enact a school-financing scheme that is thorough and efficient, as explained in *DeRolph I, DeRolph II*, and the accompanying concurrences." Id. at ¶ 5. In the *DeRolph IV* mandate, we ordered the common pleas court "to carry the following judgment in this cause into execution":

{¶12} "IT IS ORDERED by the court that, consistent with the opinion rendered herein, 2002-Ohio-6750, [97 Ohio St.3d 434, 780 N.E.2d 529], the decision entered in this case on September 6, 2001, be, and hereby is, vacated and that this court's decisions in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, and *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993, are the law of the case and that the current school-funding system is unconstitutional." *DeRolph v. State*, 97 Ohio St.3d 1477, 2002-Ohio-6750, 780 N.E.2d 282.

Motion for Compliance Conference

{¶13} On March 4, 2003, the *DeRolph* plaintiffs moved the trial court to schedule and conduct a conference to address the defendants' compliance with the orders of the common pleas court and this court. The *DeRolph* plaintiffs also requested that, consistent with the trial court's 1999 remedial order, the defendants be ordered to prepare a report setting forth proposals to comply with the court's judgment. In their motion, the *DeRolph* plaintiffs asked the common pleas court to schedule "a compliance conference at the earliest possible time, in order to ensure that the State initiates, without further delay, the process of formulating a school funding system that satisfies the mandates of the Supreme Court."

DeRolph V

{¶14} Three days later, on March 7, 2003, the state filed this action for a writ of prohibition preventing respondents, Judge Lewis and the common pleas court, from exercising further jurisdiction in *DeRolph*. The state also moved for an emergency stay of proceedings pending resolution of the state's request for a writ of prohibition. On March 10, 2003, the *DeRolph* plaintiffs and the Ohio Coalition for Equity & Adequacy of School Funding moved to intervene as additional respondents. On March 12, the state filed a memorandum opposing the motion to intervene. On March 17, Judge Lewis responded to the state's emergency motion for a stay by citing the *DeRolph I* grant of authority to him to petition this court for guidance and stating that since "this case continues in uncharted waters, this Court hereby seeks guidance as to the proper course to follow in the case at bar."

{¶15} On March 26, respondents Judge Lewis and the common pleas court filed a response to the complaint in which they reiterated that they seek guidance from us "as to the proper course to follow in the case at bar." On April 3, we denied the state's motion for an emergency stay and granted the motion to intervene. *State ex rel. State v. Lewis*, 98 Ohio St.3d 1509, 2003-Ohio-1572, 786 N.E.2d 60.

{¶16} The cause is now before the court under S.Ct.Prac.R. X(5) for our determination whether to dismiss the complaint or grant a peremptory or alternative writ.

Prohibition

{¶17} The state seeks a writ of prohibition to prevent Judge Lewis and the common pleas court from exercising further jurisdiction in *DeRolph*. In order to be entitled to the requested writ, the state must establish that (1) Judge Lewis and the common pleas court are about to exercise judicial or quasi-judicial power, (2) the exercise of that power is not authorized by law, and (3) denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas,* 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E. 2d 92, ¶ 14.

{¶18} In cases of a patent and unambiguous lack of jurisdiction, the requirement of a lack of an adequate remedy of law need not be proven because the availability of alternate remedies like appeal would be immaterial. See, e.g., *State ex rel. Goldberg v. Mahoning Cty. Probate Court* (2001), 93 Ohio St.3d 160, 162, 753 N.E.2d 192.

{¶19} Conversely, "[i]n the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction and a party challenging that jurisdiction has an adequate remedy by appeal." *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522, ¶ 18.

{¶20} Therefore, the dispositive issue is whether Judge Lewis and the common pleas court *patently and unambiguously* lack jurisdiction over the *DeRolph* plaintiffs' motion for a compliance conference. For the following reasons, we grant a peremptory writ of prohibition. We hold that the exercise of further jurisdiction in this litigation would violate our *DeRolph IV* mandate.

The Trial Court's 1999 Remedial Order

{¶21} The *DeRolph* plaintiffs asserted two grounds in their motion for a compliance conference to support the continuing exercise of jurisdiction by the trial court in *DeRolph*: (1) the trial court's 1999 remedial order and (2) our mandate in *DeRolph IV*.

{¶22} The trial court's 1999 remedial order is inconsistent with *DeRolph II* and our various rulings during the *DeRolph* litigation. Instead of affirming the trial court's remedy of ordering the State Superintendent of Public Instruction and the State Board of Education to prepare reports containing proposals to comply with *DeRolph I* and *II*, we ordered a different remedy: granting the state additional time to comply with the Ohio Constitution and maintaining continuing jurisdiction over the case. *DeRolph II*, 89 Ohio St.3d at 36-38, 728 N.E.2d 993. Notably, we expressly denied

comparable relief in *DeRolph II* by declining to appoint a special master to oversee the state's efforts to comply with Section 2, Article VI. Id., 89 Ohio St.3d at 38, 728 N.E.2d 993. Because the trial court's 1999 remedial order was inconsistent with our holding in *DeRolph II*,[1] that order was reversed and retains no validity.

{¶23} Moreover, by repeatedly denying the *DeRolph* plaintiffs' requests for comparable remedial relief throughout this litigation, we intended to preclude this relief. *DeRolph*, 79 Ohio St.3d 297, 681 N.E.2d 424 (ordering court to deny *DeRolph* plaintiffs' motion to follow schedule to comply with *DeRolph I*); *DeRolph*, 85 Ohio St.3d 1488, 709 N.E.2d 1215 (staying trial court's 1999 remedial order pending appeal); *DeRolph v. State* (2001), 91 Ohio St.3d 1225, 741 N.E.2d 533 (declining to grant *DeRolph* plaintiffs' motion for an order requiring defendants to "file a master plan, and to file subsequent progress reports").

{¶24} Therefore, the trial court's 1999 remedial order did not survive our decision in *DeRolph II* and provides no support for any exercise of jurisdiction by the trial court over the *DeRolph* plaintiffs' motion for a compliance conference.

Mandate

{¶25} The remaining basis claimed by the *DeRolph* plaintiffs for authorizing continued jurisdiction by the trial court to

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[1] We affirmed "those portions of the trial court decision that are consistent with the foregoing opinion." *DeRolph II*, 89 Ohio St.3d at 38, 728 N.E.2d 993.

consider their motion for a compliance conference is that this exercise of jurisdiction is contemplated, and in fact required, by our mandate in *DeRolph IV*. Conversely, the state asserts that a writ of prohibition is warranted because any further exercise of jurisdiction by the trial court would violate the *DeRolph IV* mandate.

{¶26} As the parties agree, a writ of prohibition is appropriate to require lower courts to comply with the mandate of a superior court. *Berthelot v. Dezso* (1999), 86 Ohio St.3d 257, 259, 714 N.E.2d 888. Extraordinary relief in prohibition is appropriate under these circumstances because the Ohio Constitution does not confer jurisdiction on courts of common pleas to review mandates of superior courts. *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna* (1995), 73 Ohio St.3d 180, 182, 652 N.E.2d 742.

{¶27} Because we issued the *DeRolph IV* mandate that the plaintiffs seek to enforce, this court is in the best position to determine whether Judge Lewis's exercise of jurisdiction over the *DeRolph* plaintiffs' motion for a compliance conference would be contrary to that mandate. See *State ex rel. Borden v. Hendon*, 96 Ohio St.3d 64, 2002-Ohio-3525, 771 N.E.2d 247, ¶ 9, quoting *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 252, 648 N.E.2d 1355 (" 'The court that issued the order sought to be enforced is in the best position to determine [whether] that order has been disobeyed' ").

{¶28} We crafted our language in the *DeRolph IV* mandate to order that the trial court "carry this judgment into execution." 97 Ohio St.3d 1477, 2002-Ohio-6750, 780 N.E.2d 282. We *did not* remand the cause for *further proceedings*. See R.C. 2505.39 ("A court that reverses or

affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but *shall send a special mandate to the lower court for execution or further proceedings*" [emphasis added]). In fact, if we had intended a remand for further proceedings in this litigation, we would have expressly provided for that action. See *DeRolph I*, 78 Ohio St.3d at 213, 677 N.E.2d 733. By contrast, we did not specify any remand in *DeRolph IV*.

{¶29} Moreover, despite their disclaimer to the contrary, the *DeRolph* plaintiffs are requesting continuing judicial oversight of the preparation of the final legislative remedy. For example, in their memorandum in support of their motion for a compliance conference, the *DeRolph* plaintiffs request that Judge Lewis "conven[e] a conference and requir[e] the State to advise * * * *when and how it intends to comply with DeRolph IV and the 1999 [remedial] orders.*" (Emphasis added.)

{¶30} The *DeRolph* plaintiffs' request is nothing more than an ill-disguised attempt to require judicial approval for proposed remedies *even before those remedies are enacted*, i.e., requesting advisory rulings on the constitutionality of legislation that has not yet been passed.

{¶31} This, however, would constitute an unquestioned violation of the *DeRolph I, II,* and *IV* mandates. See, e.g., *DeRolph I*, 78 Ohio St.3d at 213, 677 N.E.2d 733, fn. 9 ("we recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the clearly legislative function of deciding what the new legislation will be"); *DeRolph II*, 89 Ohio St.3d at 12, 728 N.E.2d 993 ("it is for

the General Assembly to legislate a remedy"). It also constitutes an inappropriate request for an advisory opinion. Cf. *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176, 25 OBR 243, 495 N.E.2d 904, syllabus ("it is well-settled that this court will not indulge in advisory opinions"). In addition, as previously discussed, because the trial court's 1999 remedial orders were not affirmed by this court in *DeRolph II*, these orders are no longer valid.

{¶32} Furthermore, as the state cogently observes, a review of the various opinions in *DeRolph IV* supports our construction that no further jurisdiction over that particular case would be exercised, whether by this *or any other court*. See, e.g., *DeRolph IV*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529, ¶ 16 (Resnick, J., concurring) ("it does seem likely that further litigation will be forthcoming in the area of school funding, even though it apparently will be under a name other than *DeRolph*"); id. at ¶ 28 (Lundberg Stratton, J., concurring in part and dissenting in part) ("it is proper for the majority to dismiss the case once it has reached a finding of unconstitutionality"); id. at ¶ 37 (Moyer, C.J., dissenting) ("[the majority] implicitly declares this case concluded, yet does so without fully disposing of the issues that have developed during the litigation"); id. at ¶ 73 (Cook, J., dissenting) ("For the reasons I have expressed throughout this court's consideration of this cause, the court should dismiss this case"). Nor does the plurality opinion in *DeRolph IV* suggest any continued retention of jurisdiction by this court or the trial court.

{¶33} Therefore, our *DeRolph IV* mandate forbids Judge Lewis and the common pleas court to exercise further jurisdiction in this matter. We never held in *DeRolph II* or *IV*

that Judge Lewis's 1999 remedial order or, for that matter, the *DeRolph* plaintiffs' mandatory-injunction claim would be revived when we relinquished our jurisdiction. The duty now lies with the General Assembly to remedy an educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional.

{¶34} Accordingly, because it is beyond doubt that Judge Lewis and the common pleas court patently and unambiguously lack jurisdiction over any post-*DeRolph IV* proceedings, we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State*. See, e.g., *State ex rel. Kim v. Wachenschwanz* (2001), 93 Ohio St.3d 586, 588, 757 N.E.2d 367. In so holding, we abide by the usual practice that when a court declares a legislative act to be unconstitutional, that court generally does not remand the case with an order to retain jurisdiction over the constitutionality of new legislation enacted in response to its declaration. See, e.g., *DeRolph IV*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529, ¶ 16 (Resnick, J., concurring) ("In the normal case, when this court finds a particular statute or series of statutes unconstitutional, there is no thought given to retaining jurisdiction * * *"); *DeRolph*, 78 Ohio St.3d at 422, 678 N.E.2d 886 (Moyer, C.J., concurring in part and dissenting in part) ("Typically, when a Supreme Court declares a legislative act to be unconstitutional it does not order the legislative body to enact new legislation. Nor does it remand the case to a trial court with an order to retain jurisdiction over the consequent act of the legislative authority, including jurisdiction to rule upon the constitutionality of the new legislation"); id. at 423, 678 N.E.2d 886 (Lundberg Stratton, J., concurring in part and dissenting in part) ("the judiciary's role in this matter is complete and * * *, as with all other

legislation declared unconstitutional by this court, we must await new challenges to the new legislation").[2]

{¶35} Therefore, we grant the peremptory writ of prohibition and order Judge Lewis to dismiss the motion now pending before his court.

Writ granted.

PFEIFER, J., concurs.

MOYER, C.J., COOK and O'CONNOR, JJ., concur in judgment only.

RESNICK and F.E. SWEENEY, JJ., dissent.

Jim Petro, Attorney General, Roger F. Carroll, James G. Tassie and Sharon A. Jennings, Assistant Attorneys General, for relator.

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[2] Other state supreme courts have similarly refused to retain jurisdiction after declaring school-funding legislation unconstitutional. See, e.g., *Lake View School Dist. No. 25 of Phillips Cty. v. Huckabee* (2002), 351 Ark. 31, 91 S.W.2d 474, 511 ("It is not this court's intention to monitor or superintend the public schools of this state. Nevertheless, should constitutional dictates not be followed, as interpreted by this court, we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case"); *Hull v. Albrecht* (1998), 192 Ariz. 34, 960 P.2d 634; *Helena Elementary School Dist. No. 1 v. State* (236 Mont. 44, 61, 1990), 784 P.2d 412 ("We decline to retain jurisdiction in this matter. The legislative changes in 1989 and 1991 will require new and different proof on the part of any parties challenging the same. We conclude that should such action be necessary, it can be presented in a new and separate court action").

Stephen R. Herendeen, Perry County Assistant Prosecuting Attorney, for respondents.

Bricker & Eckler, L.L.P., Nicholas J. Pittner, John F. Birath Jr., Sue W. Yount, Quintin F. Lindsmith and Susan B. Greenberger, for intervening respondents.

APPENDIX B

The Supreme Court of Ohio

CASE ANNOUNCEMENTS
AND ADMINISTRATIVE ACTIONS

April 2, 2003

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MOTION AND PROCEDURAL RULINGS

2003-0447. State ex rel. State v. Lewis.
In Prohibition. On emergency motion for stay of any proceedings in *DeRolph v. State*, Perry County Common Pleas Court case No. 22043. Motion denied.

On motion for leave to intervene of the *DeRolph* plaintiffs and the Ohio Coalition for Equity and Adequacy of School Funding. Motion granted.

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*** This document has been excerpted for purposes of this appendix. Only the relevant portion of the document is reproduced.

APPENDIX C

SUPREME COURT OF OHIO

No. 1999-0570

Submitted October 30, 2001
Decided December 11, 2002

DEROLPH, ET AL., *APPELLEES*,

v.

THE STATE OF OHIO, ET AL., *APPELLANTS*.

Constitutional law — Education — Schools — Current school-funding system unconstitutional —General Assembly directed to enact a school-funding scheme that is thorough and efficient.

Common Pleas Court of Perry County, No. 22043.
ON MOTION FOR RECONSIDERATION.

PFEIFER, J.

{¶1} In *DeRolph v. State* (2001), 93 Ohio St.3d 309, 310, 754 N.E.2d 1184 ("*DeRolph III*"), this court issued an

opinion with which none of the majority was "completely comfortable." As the author, Chief Justice Moyer, noted, we did so in an attempt to eliminate the "uncertainty and fractious debate" occasioned by our continued role in the case. Id. at 311, 754 N.E.2d 1184. A motion was filed asking this court to reconsider its decision. We granted that motion and ordered a settlement conference pursuant to S.Ct.Prac.R. XIV(6)(A). *DeRolph v. State* (2001), 93 Ohio St.3d 628, 758 N.E.2d 1113. Settlement efforts were unavailing, and we now rule on the merits of the case on reconsideration.

{¶2} In *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, syllabus, ("*DeRolph I*"), this court stated, "Ohio's elementary and secondary public school financing system violates Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state." In *DeRolph I*, this court admonished the General Assembly to create a new school-funding system, but otherwise provided no specific guidance as to how to enact a constitutional school-funding system. Id. at 213, 677 N.E.2d 733. See id. at 262, 677 N.E.2d 733 (Pfeifer, J., concurring) (the majority opinion "does neither more nor less than the syllabus law sets forth").

{¶3} Three years later, after the General Assembly had enacted various changes to the school-funding system, this court again determined that the school-funding system was unconstitutional. *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*"). We stated, " '[T]he sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools,' but rather a thorough and efficient system of common schools. *Miller v. Korns* (1923), 107 Ohio St. 287, 297-298,

140 N.E. 773, 776, approved and followed." *DeRolph II*, paragraph one of the syllabus. As in *DeRolph I*, the majority did not provide specific guidance to the General Assembly as to how to enact a constitutional school-funding system. But, see, *DeRolph II* at 47, 728 N.E.2d 993 (Pfeifer, J., concurring). Some of us praised the efforts of the General Assembly, and that praise was deserved. Id. at 41, 728 N.E.2d 993 (Douglas, J., concurring).

{¶4} We are aware of the difficulties that the General Assembly must overcome, and that is why we have been patient. The consensus arrived at in *DeRolph III* was in many ways the result of impatience. We do not regret that decision, because it reflected a genuine effort by the majority to reach a solution to a troubling constitutional issue. However, upon being asked to reconsider that decision, we have changed our collective mind. Despite the many good aspects of *DeRolph III*, we now vacate it. Accordingly, *DeRolph I* and *II* are the law of the case, and the current school-funding system is unconstitutional.

{¶5} To date, the principal legislative response to *DeRolph I* and *DeRolph II* has been to increase funding, which has benefited many schoolchildren. However, the General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Id., 78 Ohio St.3d at 212, 677 N.E.2d 733. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

{¶6} We are not unmindful of the difficulties facing the state, but those difficulties do not trump the Constitution. Section 2, Article VI of the Ohio Constitution states, "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools * * *." This language is essentially unchanged from the initial report from the Standing Committee on Education at the Constitutional Convention of 1850-51. I Report of the Debates and Proceedings of the Convention for the Revision of the Constitution, 1850-51 (1851) 693 ("Debates"). Even the minority report, presented by those opposed to the above language, had virtually the same import. It stated, "The General Assembly shall provide by law a system of common schools, and permanent means for the support thereof * * *." Id. at 694.

{¶7} The delegates and through them the people of this state expressed their desire for more and better education and their desire that the state should be responsible for it. Delegate J. McCormick, from Adams County, stated, "Under the old Constitution it is provided that public schools and the cause of education shall be forever encouraged; and, under this constitutional provision, we have trusted the General Assembly for forty-eight years; and we may trust them for forty-eight years longer, without any good result. * * * Our system of common schools, instead of improving in legislative hands, has been degenerating; and I think it is time that we should take the thing in hands ourselves." II Debates 702. William Hawkins, a delegate from Morgan County, said, "[W]e are warranted by public sentiment in requiring at the hands of the General Assembly a full, complete and efficient system of public education." Id. at 16. The delegates

perceived the General Assembly of that time as being insufficiently committed to education. Even though some delegates wanted to leave matters wholly to local authorities, see id. at 17, the delegates in their wisdom decided to include the Thorough and Efficient Clause in the Constitution. They and the people used the Constitution to command ongoing affirmative action by the General Assembly.

{¶8} James Taylor, a delegate from Erie County, stated, "I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child in the State, the offspring of the black man equally with that of the white man, the children of the poor equally with the rich." Id. at 11. Samuel Quigley, a delegate from Columbiana County, stated, "[T]he report directs the Legislature to make full and ample provision for securing a thorough and efficient system of common school education, free to all the children in the State. The language of this section is expressive of the liberality worthy a great State, and a great people. There is no stopping place here short of a common school education to all children in the State." Id. at 14. The delegates knew what they wanted, what the people wanted, and that it was necessary to use the Constitution to achieve what they wanted.

{¶9} The Thorough and Efficient Clause is part of our Constitution and part of our heritage. There were delegates who approved of even stronger language. Delegate McCormick proposed "a consolidation of all the general and local funds of the State, and distribution of the amount equally among the children of the State." II Debates at 17. Otway Curry, a delegate from Union County, expressed his concern that the Thorough and Efficient Clause would "prove totally

insufficient and powerless." Id. at 710. Were this court to avoid its responsibility to give continued meaning to the Constitution, his fears would become reality.

{¶10} The Constitution of this state is the bedrock of our society. It expressly directs the General Assembly to secure a thorough and efficient system of common schools, and it does so expressly because the legislature of the mid-nineteenth century would not. As R.P. Ranney, a delegate from Trumbull County, put it, "I desire to lay a plan such as within certain limits the Legislature shall be bound to carry out." Id. at 16.

{¶11} We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate must be met. The Constitution protects us whether the state is flush or destitute. The Free Speech Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, the Thorough and Efficient Clause of the Ohio Constitution, and all other provisions of the Ohio and United States Constitutions protect and guard us at all times. Harman Stidger, a delegate from Stark County, said, "If we should leave every thing to the Legislature, why not adjourn this Convention sine die, at once?" Id. at 11. The same could be said of this court and the Ohio Constitution.

Judgment accordingly.

RESNICK and F.E. SWEENEY, JJ., concur.
RESNICK, J., concurs separately.
DOUGLAS, J., concurs in judgment only.

LUNDBERG STRATTON, J., concurs in part and dissents in part.
MOYER, C.J., dissents.
COOK, J., dissents.

ALICE ROBIE RESNICK, J., concurring.

{¶12} I concur in today's majority opinion. Given the views I expressed in my dissent in *DeRolph v. State* (2001), 93 Ohio St.3d 309, 344-375, 754 N.E.2d 1184 ("*DeRolph III*"), I of course agree with this court's decision to vacate the majority opinion in *DeRolph III*. I have no desire to reiterate in detail the contents of that dissent, which were consistent with my views in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 ("*DeRolph I*"), and *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*"). It appears that much of what this court stated in *DeRolph I* and *II* has fallen on deaf ears. It is not likely that stating at length the same message once again would have much of an effect; rather, it probably would be preaching to the choir, in that only those whose viewpoints align with mine would listen, and the rest of the members of the General Assembly would continue to do nothing.

{¶13} That said, I regret that I must nevertheless write. Even though it seems that everything that can be said in this case has already been said, there is a need to send an additional message to the citizens of Ohio and to respond to the Chief Justice's critical dissenting opinion. The Chief Justice appears to be sending his own strong message to the General Assembly that there is no need to do anything further

in Ohio to provide each child an adequate education, beyond the trivial face-saving changes he proposes.

{¶14} To that end, the Chief Justice ignores the deficiencies in the legislative response thus far and, as did his majority opinion in *DeRolph III*, seems to believe that a half-fought battle is equivalent to a resounding victory as long as this court is no longer involved in this case. As one who has also been immersed in this case for a number of years, and as the author of the majority opinion in *DeRolph II*, I emphatically disagree with the Chief Justice's view of the legislative initiatives enacted in response to the pronouncements of this court.

{¶15} The Chief Justice bemoans the fact that further litigation may be inevitable in light of the decision today, calling that possibility an "unfortunate eventuality." Infra at ¶ 35 (Moyer, C.J., dissenting). However, what the Chief Justice's imperceptive view ignores is that as long as the General Assembly does not definitively fix the school-funding problem, which is its task alone, or at least make a realistic effort to do so, further litigation will be inevitable as a matter of course, since the court is the only body that definitively determines the constitutionality of laws.

{¶16} In the normal case, when this court finds a particular statute or series of statutes unconstitutional, there is no thought given to retaining jurisdiction, because we assume that our constitutional adjudication will be respected and that if the General Assembly decides to reenact similar legislation, it will take the necessary steps to transform what has been determined to be unconstitutional into something that complies with our Constitution. But as history shows, the General

Assembly has never mounted a concerted effort to fix the school-funding crisis and, given the tenor of the Chief Justice's dissent, will not be expected to put forth a good-faith effort to do so in the future. Given that state of affairs, it does seem likely that further litigation will be forthcoming in the area of school funding, even though it apparently will be under a name other than *DeRolph*. However, while the Chief Justice sees this situation as "unfortunate," I view it as inevitable precisely because so long as the system remains unconstitutional, our students' interests can be furthered only by continuing to press for the reformation of the system.

{¶17} As I and other members of this court have repeatedly stated, until a complete systematic overhaul of the system is accomplished, it will continue to be far from thorough and efficient and will continue to shortchange our students. The overreliance on local property taxes is the fatal flaw that until rectified will stand in the way of constitutional compliance. One thing the now-vacated majority opinion in *DeRolph III*, along with the various accompanying opinions, served to illustrate is that the system we have reviewed simply falls far short of satisfying the requirements of our Constitution. Today's result drives home that point, albeit belatedly.

{¶18} The Chief Justice disingenuously tries to blunt the force of this court's decisions in *DeRolph I* and *DeRolph II* by focusing only on the syllabus paragraphs of those two decisions and ignoring the full content and import of what this court actually said. He labels everything beyond the syllabus paragraphs in those two decisions "dicta," and thereby downplays the clear requirement voiced by the majority opinions in those two cases that our school-funding system will never be truly thorough and efficient until a complete

systematic overhaul of the system is accomplished. As the majority states, " 'a complete systematic overhaul' of the school-funding system" surely was the "core constitutional directive of *DeRolph I*" and also was a very large part of *DeRolph II*. Supra at ¶ 5.

{¶19} Of course, the Chief Justice was not in the majority in those two decisions, and his effort to recast this court's holdings into something more to his liking rings hollow. The Chief Justice's majority opinion in *DeRolph III* featured this same transparent ploy to justify his implausible view that a system that he had approved in his dissents in both *DeRolph I* and *DeRolph II* had somehow become unconstitutional in his eyes in *DeRolph III* (even though more improvements to the system had been made since *DeRolph II*), unless the further changes ordered by the *DeRolph III* majority were accomplished.

{¶20} In trying to recast the opinions in *DeRolph I* and *DeRolph II* into something that he can agree with, the Chief Justice attempts to pass off his own distorted vision of this case as if it were perfectly logical and well reasoned. In my view, today's decision, by vacating the majority opinion in *DeRolph III*, gives a fitting burial to an initiative of this court that was ill advised from the start.

{¶21} It becomes obvious that the only practical solution to the dilemma posed by this case lies with the citizens of Ohio. The voters of Ohio have the power to pass a constitutional amendment to the Thorough and Efficient Clause, Section 2, Article VI of the Ohio Constitution, which for all time will require an adequate amount of funding to be spent on every Ohio student regardless of where in the state that child

resides. A constitutional amendment is necessary to remedy the General Assembly's failure to perform its responsibilities.

{¶22} One possibility for amending the Thorough and Efficient Clause would be to adopt a requirement of a specific dollar amount of spending for each pupil and a formula for arriving at that number that would ensure that each district has sufficient funds to operate effectively year after year. In that scenario, it would be necessary to include a provision for adjusting the specific dollar amount, to keep pace with inflation and with any other changes in costs that may occur. In this way, if the per-pupil spending is established at an adequate level, overreliance on local property taxes will be eliminated. The state will thereby be required to fund the system at a level that complies with the specific constitutional mandate.

{¶23} I do not lightly advocate amendments to our state's Constitution, which already seems to be more detailed in many areas than it should be. However, in the school-funding area, the stakes are sufficiently high that I do not hesitate to make an exception in view of the General Assembly's reluctance to act. Our education system is the backbone of our democracy and the future of our state. We must give each student a realistic opportunity to succeed, and our current funding system does not do so. This continuing untenable situation has been allowed to endure for far too long, and far too many students have been shortchanged.

{¶24} A majority of this court now corrects a situation that was created simply by a desire for an expedient resolution of this case. Because the current school-funding legislation falls well short of satisfying the requirements of our Constitution,

I concur in today's decision and strongly encourage the citizens of Ohio to pursue a constitutional amendment that the General Assembly will not be able to ignore.

DOUGLAS, J., concurring in judgment only.

{¶25} The Chief Justice, in his dissent herein, in Section D, entitled "Summary," well states my position on the matter pending before us. I would, as he suggests, reaffirm our decision in *DeRolph III* with the exception of the wealth-screening issue. There are not, however, four votes for that approach. Accordingly, I concur only in the judgment of the majority.

Lundberg Stratton, J., concurring in part and dissenting in part.

{¶26} In *DeRolph* v. *State* (2001), 93 Ohio St.3d 309, 754 N.E.2d 1184 ("*DeRolph* III"), I concurred in the decision, not because I believed the school-funding system to be unconstitutional, but rather as a pragmatic compromise to end our role in defining what was "thorough and efficient," under the Ohio Constitution, because it was not our role in the first place to determine this issue. I continue to adhere to the dissents I joined in *DeRolph v.* State (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, and *DeRolph v.* State (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*").

{¶27} I joined the majority that granted the motion to reconsider *DeRolph* III not because I "changed my collective mind" as the majority asserts, but because both sides

conceded that we had been provided faulty data which made the formulas before us inaccurate. Since we are not permitted to go outside the record, we could not have verified the evidence on our own accord. Having based our decision on testimony that was conceded by both parties to be wrong, it was legally necessary for us to reconsider it.

{¶28} The former majority has regrouped, and now merely declares the funding system not yet constitutional and dismisses the case. While I do not agree with its conclusion, I do believe that it is proper for the majority to dismiss the case once it has reached a finding of unconstitutionality. In that aspect, I differ with Chief Justice Moyer. In no case other than *DeRolph* have we retained jurisdiction once we have made a finding of unconstitutionality. We are not charged by the Constitution with fashioning new legislation that we believe meets the constitutional mandate. That role is assigned only to the legislature, and to the legislature has that role now been properly returned.

{¶29} Therefore, I dissent from the holding that the progress made under *DeRolph II* still falls short of a "thorough and efficient system," but given the majority's decision that the funding system is still unconstitutional, I agree that the majority is correct in not retaining jurisdiction.

MOYER, C.J., dissenting.

I
Majority Decision on Reconsideration

{¶30} On September 6, 2001, this court rendered its third decision on the merits in this case concerning the constitutionality of Ohio's system of funding public primary and secondary education. *DeRolph v. State* (2001), 93 Ohio St.3d 309, 754 N.E.2d 1184 ("*DeRolph III*"). On September 17, 2001, the defendants-appellants, the state of Ohio, the Ohio Board of Education, the Ohio Superintendent of Public Instruction, and the Ohio Department of Education (collectively referred to as "the state"), filed a motion asking this court to reconsider that decision.

{¶31} S.Ct.Prac.R. XI(2)(A)(4) allows a motion for reconsideration of a decision on the merits of a case. "We have invoked the reconsideration procedures set forth in S.Ct.Prac.R. XI to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council* (1996), 75 Ohio St.3d 381, 383, 662 N.E.2d 339. See, also, *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 697 N.E.2d 181.

{¶32} In November 2001, we granted the state's motion for reconsideration, thereby delaying issuance of a mandate. *DeRolph v. State* (2001), 93 Ohio St.3d 1470, 757 N.E.2d 381. See, also, S.Ct.Prac.R. XI(4). Rather than immediately reconsidering our holdings in *DeRolph III,* we first ordered a settlement conference pursuant to S.Ct.Prac.R. XIV(6)(A). 93 Ohio St.3d 628, 758 N.E.2d 1113. On March 21, 2002,

the court-appointed master commissioner, Howard Bellman, notified the court that mediation had not produced a resolution.

{¶33} Courts exist as forums for the resolution of disputes. Ideally, parties involved in litigation are able themselves to negotiate a settlement of their disputes, through mediation or otherwise. When that does not occur, it is the responsibility of the court to render a final judgment that fully and finally disposes of the issues presented to it. Generally, one or more litigants then feel vindicated while others are left to accept a judgment with which they disagree. Nevertheless, the court has done its work where the parties are able to accept the decision of the court as final, put their dispute behind them, and proceed in accordance with the judgment.

{¶34} Unfortunately, the majority today issues an opinion that ignores as many questions as it decides. It thereby evades its fundamental responsibility to resolve a dispute it agreed five years ago to resolve and leaves the citizens of Ohio with a decision that can at best be described as ambiguous.

{¶35} As a result, it is virtually inconceivable that today's judgment will, in fact, end litigation relative to the constitutionality of Ohio's current school-funding system. The issues will almost certainly again come before this, or another, Ohio court. I write today in anticipation of that unfortunate eventuality. Specifically, I write to reiterate that I do not consider dicta contained in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 ("*DeRolph I*"), or *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*"), to constitute the law of this case or controlling precedent.

{¶36} Unlike the majority, I do not believe the creation of a "complete systematic overhaul" to be the "core constitutional directive of *DeRolph I,*" majority opinion at ¶ 5, nor do I believe that the General Assembly is constitutionally required to make such an overhaul. See *DeRolph III,* 93 Ohio St.3d at 312, 754 N.E.2d 1184 ("It is the law *contained in the syllabi* to *DeRolph I* and *DeRolph II* and the principles established by court entry in the case at bar by which we are required to evaluate the constitutionality of the school-funding system now statutorily in place" [emphasis added]). Indeed, today's majority opinion at ¶ 2 acknowledges that *DeRolph I* did " 'neither more nor less than the syllabus law sets forth,' " quoting *DeRolph I,* 78 Ohio St.3d at 262, 677 N.E.2d 733 (Pfeifer, J., concurring).

{¶37} The majority today vacates our decision in *DeRolph III,* replaces it with little more than a summary proclamation of a change of "collective mind," declares the current school-funding system unconstitutional, and proclaims *DeRolph I* and *II* to be the law of the case. It thereby returns the parties (and all Ohio citizens) to the uncertain positions in which they stood two and one-half years ago on May 11, 2000, when *DeRolph II* was decided, with one exception: the majority fails to retain jurisdiction of the cause by the courts as it did after both *DeRolph I* and *DeRolph II.* In so doing, it implicitly declares this case concluded, yet does so without fully disposing of the issues that have developed during the litigation.

{¶38} The court in *DeRolph I* stayed the effect of its decision for 12 months and remanded the cause to the trial court, which was granted plenary jurisdiction to enforce that decision. *Id.*, 78 Ohio St.3d at 213, 677 N.E.2d 733. Shortly

thereafter, this court answered in the negative the trial court's question whether the Supreme Court should "retain exclusive jurisdiction of the case to review all remedial legislation enacted." *DeRolph v. State* (1997), 78 Ohio St.3d 419, 678 N.E.2d 886.

{¶39} Writing separately, I cited the general principle that "[t]ypically, when a Supreme Court declares a legislative act to be unconstitutional it does not order the legislative body to enact new legislation." Nevertheless, given the majority's unfortunate decision on the merits in *DeRolph I*, I concluded that "the most expeditious means of removing the uncertainty regarding the constitutionality of the new plan is for this court to issue an order retaining jurisdiction in this court." Id., 78 Ohio St.3d at 422, 678 N.E.2d 886 (Moyer, C.J., dissenting). This conclusion was based on my recognition that "uncertainty will envelop all aspects of public school funding in our state until the day this court deems a new funding system to be constitutional." Id. at 423, 678 N.E.2d 886 (Moyer, C.J., dissenting).

{¶40} When the deadline for compliance in *DeRolph I* had passed, the majority in *DeRolph II* again continued the case, for yet another year, until June 15, 2001. 89 Ohio St.3d at 38, 728 N.E.2d 993. This time, however, the court retained jurisdiction, in anticipation of further briefing in this court at that time.

{¶41} Today, however, the majority says nothing concerning enforcement of its reaffirmed declaration that the current school-funding system is unconstitutional. It neither retains jurisdiction in this court nor remands the cause to the trial court. More than five years after *DeRolph I*, the majority

today switches course by implicitly holding that a declaration of unconstitutionality, standing alone, adequately resolves the dispute before us.

{¶42} I believe that the majority, having twice ordered deadlines for compliance with its judgments, raised the expectation that it would ultimately render a decision that would be final. Had the majority chosen the more traditional course in 1997, it would now be acting consistently in simply declaring the system unconstitutional. But too much energy and too many resources have been expended, and the state has made too much progress, for the court now to excuse itself from the process. That is the reason I believe we should modify our decision in *DeRolph III*, resolve the issues, and terminate the role assumed by this court in creating public policy.

{¶43} The majority today directs the General Assembly to "enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I, DeRolph II*, and the accompanying concurrences." Supra at ¶ 5. I do not believe that the opinions in DeRolph *I* and *II* provide the General Assembly with clear guidance. I certainly do not believe that the opinions of individual members of the court as reflected in separate concurrences are binding in any litigation that may follow today's decision.

{¶44} The majority has yet to define what it means by "overreliance" on property tax, and Ohio's policymakers are left to wonder, "If the percentage of local to state funding were inverted would that be sufficient, or is the majority seeking only a fifty-one-percent reliance on state funds?" Id., 89 Ohio St.3d at 52, 728 N.E. 2d 993 (Moyer, C.J.,

dissenting). As guidance, the majority offers the observation that the General Assembly has done no more than merely "nibbl[e] at the edges" of the current system. Supra at ¶ 5. The infusion of billions of additional dollars into the public school system of this state in the last ten years, as demonstrated in the record before us, constitutes significantly more than "nibbling" at the edges or elsewhere.

{¶45} *DeRolph I* and *II* do not require the elimination of all qualitative differences among the state's local schools. This court has recognized in *DeRolph I* and *II,* and in other decisions in this cause, that communities that so choose may supplement their educational programs beyond minimum requirements. *DeRolph I*, 78 Ohio St.3d at 211, 677 N.E.2d 733; *DeRolph II*, 89 Ohio St.3d at 27-28, 728 N.E.2d 993. *DeRolph I* and *II* held that the funding system violates the Thorough and Efficient Clause of the Ohio Constitution; they did not hold that it violates the Equal Protection Clause. *DeRolph* I, 78 Ohio St.3d at 202, 677 N.E.2d 733, at fn. 5; DeRolph *v. State* (1998), 83 Ohio St.3d 1212, 699 N.E.2d 518.

{¶46} Nor do *DeRolph I* and *II* require the elimination of a statewide system of school funding based on property tax. Despite the majority's reliance on statements of individual members of the 1851 Constitutional Convention, historically, "[l]ocal property taxes have funded Ohio schools since 1825—*before* the adoption of the Education Clause." (Emphasis sic.) *DeRolph I*, 78 Ohio St.3d at 265, 677 N.E.2d 733 (Moyer, C.J., dissenting). They have constituted a major source of school funding ever since. To the extent that the majority's original finding of unconstitutionality in *DeRolph I* was based on indefensible deficiencies then

existing in some public school facilities, arguably supporting the contention that the local-property-based system then in place violated the Thorough and Efficient Clause, those conditions have been, or are being, ameliorated by the massive infusion of state funds into the public school system since this action was originally filed. *DeRolph I* was centered on the establishment of a floor of adequacy—a basic educational opportunity, as contemplated in *Miller v. Korns* (1923), 107 Ohio St. 287, 140 N.E. 773, and *Cincinnati School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813.

{¶47} Despite today's decision, I fear that the weight of *DeRolph v. State* will continue to burden not only each of the three branches of state government, but also the school districts and school children the majority decision purports to be helping, as well as other recipients of state tax dollars, e.g., Ohio's public institutions of higher education.

II
Proposed Modification of *DeRolph III*

{¶48} As a justice of this court, it is my responsibility to respect and follow its decisions, even those with which I disagree. Our legal system relies on doctrines such as stare decisis and the law of the case to provide consistency in the application of the law. See *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 11 OBR 1, 462 N.E.2d 410 ("the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels"). Without consistency, the law risks the appearance of caprice.

{¶49} It is not unusual for me to join a judgment that is based on a decision with which I initially strongly disagreed. E.g. *Ford v. Talley Mach. Co.* (1994), 68 Ohio St.3d 473, 474, 628 N.E.2d 1351 (Moyer, C.J., concurring). As early as one month after *DeRolph I*, I noted the precedential import of that decision. Writing separately in the court's disposition of the state's motion for reconsideration and clarification, I recognized that a majority of this court had ordered the legislative branch of our state government to adopt new school-funding legislation within a year, observing that "[e]ven those who disagree with the judgment of the court recognize that it is their constitutional duty to respond constructively to it." *DeRolph v. State* (1997), 78 Ohio St.3d 419, 423, 678 N.E.2d 886 (Moyer, C.J., concurring in part and dissenting in part). Accord *State ex rel. Taft v. Franklin Cty. Court of Common Pleas* (1998), 81 Ohio St.3d 1244, 1247, 691 N.E.2d 677 (Moyer, C.J., concurring) ("I concur in the entry in this case because it is consistent with the views expressed in my separate opinion in [*DeRolph v. State* (1997), 78 Ohio St.3d 419, 678 N.E.2d 886], is consistent with the spirit underlying the majority opinions in [earlier *DeRolph* decisions], and is consistent with the best interests of the people of the state of Ohio"); *DeRolph v. State* (2001), 91 Ohio St.3d 1274, 1276, 747 N.E.2d 823 ("The merit issue is now the law of the case as established by the majority").

{¶50} In *DeRolph III*, we concluded that "[i]t is the law contained in the syllabi to *DeRolph I* and *DeRolph II* and the principles established by court entry in the case at bar by which we are required to evaluate the constitutionality of the school-funding system now statutorily in place." 93 Ohio St.3d at 312, 754 N.E.2d 1184. Our conclusion was consistent with my past judicial practice of acknowledging the

law established in prior decisions and was reached in the hope that *DeRolph III* would extricate the court from the circumstances created by a majority of the court. I believed that approach to be consistent with my duty to this court and to the citizens this court serves.

{¶51} In *DeRolph III*, a majority of this court found that the General Assembly had, in the ten years since this case began, crafted significant legislation to address and correct egregious conditions in the poorest of Ohio schools. It recognized that these conditions, upon which this court's original finding of unconstitutionality in *DeRolph I* was based, had been largely ameliorated by programs to remedy severe building deterioration and perceived funding inequities. Id., 93 Ohio St.3d at 323, 754 N.E.2d 1184. We concluded that certain relatively minor modifications to the funding plan adopted by the General Assembly still needed to be made, but acknowledged that these changes would "not require structural changes to the school foundation program set forth in R.C. Chapter 3317." Id. at 325, 754 N.E.2d 1184.

{¶52} The state urges us to reconsider our holdings (1) that wealth screens may not be used in the state's school-funding foundation formula and (2) that the changes to the foundation formula ordered in *DeRolph III* should be retroactively applied as of July 1, 2001. I would modify *DeRolph III* as discussed below.

A
Inaccuracies in the Record

{¶53} In explaining our grant of a motion for reconsideration of *DeRolph III*, we noted, "Both sides acknowledge * * * that

the evidence and one of the briefs filed in *DeRolph III* contained inaccurate analysis regarding the cost of funding the base cost formula with wealth screens eliminated." *DeRolph v. State* (2001), 93 Ohio St.3d 628, 631, 758 N.E.2d 1113. The court should now acknowledge the deficiencies in the record before us at the time *DeRolph III* was decided and respond in a constructive manner to preserve the goal of *DeRolph III*, that being extrication of the judiciary from the policy-making role it wrongfully assumed in its earlier *DeRolph* decisions.

B
Wealth Screens

{¶54} We noted in *DeRolph III* that the General Assembly, in 2001 Am.Sub.H.B. No. 94 ("H.B. 94"), determined the base cost of an adequate education to be $4,814 per student in fiscal year 2002. 93 Ohio St.3d at 313, 754 N.E.2d 1184. In arriving at that figure, the General Assembly began by using "the unweighted average cost per student of educating students enrolled in selected districts," excluding the richest and poorest: "Under the new law, this selection began with one hundred seventy school districts that, in fiscal year 1999, met at least twenty of twenty-seven performance standards established by H.B. 94. R.C. 3317.012(B)(1)(a) through (aa). Districts in the top and bottom five percent of income and property wealth bases are deleted to adjust for anomalies within those districts, leaving one hundred twenty-seven model districts." Id.

{¶55} The parties use the term "wealth screens" to refer to the process of eliminating the top and bottom 5 percent of schools from the group of schools whose costs are averaged

to determine base per-pupil cost. We held in *DeRolph III* that the per-pupil base cost formula "must be modified to include the top five percent districts and the lower five percent districts," thereby ordering the elimination of wealth screens from the process by which per-pupil base cost is determined. Id. at 324, 754 N.E.2d 1184.

{¶56} Elimination of wealth screens would result in the inclusion of several school districts whose per-pupil spending is unusually high. In their brief filed in *DeRolph III*, the plaintiffs-appellees imputed ulterior motives to the General Assembly in incorporating wealth screens into the foundation formula, describing their use as an arbitrary manipulation to artificially lower the per-pupil base cost. See 93 Ohio St.3d at 332-333, 754 N.E.2d 1184 (Douglas, J., concurring). In contrast, the state contends that the use of wealth screens is wholly justifiable, in that "inclusion of data from the top and bottom five percent of districts has a dramatic effect and distorts the base cost calculation." In other words, the state argues that inclusion of the top and bottom 5 percent of school districts skews the average.

{¶57} In support of its motion for reconsideration, the state has provided us with convincing evidence[3] in support of its

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[3] The procedural posture of this case is unique; since *DeRolph II* there has not been a traditional record of facts produced in a trial court. It is appropriate that we accept supplementary evidence such as the affidavits of experts submitted by both parties. See *DeRolph v. State* (2001), 91 Ohio St.3d 1274, 1275, 747 N.E.2d 823 ("*DeRolph* is not a traditional appeal, in which the court has a previously established record available for review. Rather, *DeRolph* has become a hybrid which will require this court to

contention that "the use of wealth screens is standard practice throughout school finance and the discipline of statistics generally." It has provided us ample justification, more persuasively presented than in the briefs on the merits, for rejecting the proposition that the General Assembly's adoption of wealth screens was merely an attempt to artificially lower the final per-pupil base cost, that it evidences unlawful "residual budgeting," or that it was otherwise purely arbitrary. The record contains expert testimony from both sides supporting the use of wealth screens as an appropriate means of determining per-pupil base cost, as follows:

{¶58} • William Driscoll, an expert for the plaintiffs-appellees, testified in a deposition that he agreed with a report that stated, "Standard statistical analyses typically use 5% to estimate the tails at either end of a distribution. In this case, the tails or extreme observations do fall, in fact, in approximately the lowest and highest 5% of the range."

{¶59} • David Monk, an expert for the state and Dean of the College of Education at the Pennsylvania State University, testified in an affidavit that a "5% exclusion of this kind is a well established practice within the field of school finance given the common existence of highly atypical school districts in the tails of wealth and income distributions." Dean Monk stated that the General Assembly's "decision to use a version of the observed best practices method as the basis for its estimation of the cost of an adequate education presumes the availability of a standard that is relevant to the affected

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engage both in factfinding and application of law to those facts * * * ").

districts. * * * The purpose of the 5 percent exclusion rule is to remove highly atypical districts and to thereby preserve the spirit as well as the integrity of the standard."

{¶60} • Dr. John Augenblick, an expert consulted by the General Assembly during its legislative deliberations, testified at trial in 1998 that the spending by Ohio school districts within the top and bottom 5 percent based on wealth was atypical and should not be included in the averaging process. Dr. Augenblick testified that wealthy districts falling in the upper 5 percent of spending "provide things that go well beyond what you might think are kind of the basic or adequate services."

{¶61} • Wendy Zahn, a senior budget analyst for the Legislative Service Commission, stated that it is important to reduce the effects of the extremes of a distribution when data distribution is not normal and that "a widely used method for eliminating outliers" is to use the 5th percentile to the 95th percentile.

{¶62} • Dr. William I. Notz, professor of statistics at the Ohio State University, stated:

{¶63} "If the mean of a set of data with the most extreme values removed differs markedly from the mean computed using all the data, the extreme values would be considered outliers. In such a case, standard practice is to consider the trimmed mean as more representative [of] the center of the data.

{¶64} "Data such as income and property values typically contain outliers and it is not surprising that the school district

expenditure data shows evidence of outliers. If data from all school districts meeting the 20-27 standards are used, the base cost (average expenditures per pupil) is $5,032. Inflated to FY02 values, this number becomes $5,467. If the same quantity is computed after deleting the wealthiest 5% and poorest 5% of the districts, and is inflated to FY02 values, this number (a trimmed mean) becomes $5,023. This would be considered a marked difference *and the trimmed mean ($5,023) would be considered more representative of a typical value."* (Emphasis added.)

{¶65} The plaintiffs-appellees remain adamantly opposed to the use of an "inferential methodology" based on model school districts to derive a foundation formula for funding public education. Wealth screens are one aspect of such a funding approach. However, the General Assembly—not the plaintiffs-appellees or this court—remains the entity constitutionally charged with the responsibility of establishing a thorough and efficient system of common schools. As recognized by the majority in *DeRolph II*, 89 Ohio St.3d at 18, 728 N.E.2d 993, "deciding what methodology to adopt is a policy determination."

{¶66} There is nothing inherently unconstitutional in the method chosen by the General Assembly. Moreover, both the state and the plaintiffs-appellees have acknowledged that "the evidence and one of the briefs filed in *DeRolph III* contained inaccurate analysis regarding the cost of funding the base cost formula with wealth screens eliminated." 93 Ohio St.3d at 631, 758 N.E.2d 1113.

{¶67} Upon reconsideration, and specifically in view of the fact that we had been provided inaccurate data at the time

DeRolph III was decided, I believe our decision should be modified pursuant to S.Ct.Prac.R. XI. I am persuaded that the General Assembly's incorporation of wealth screens in determining the school foundation formula is acceptable. Accordingly, I would modify our opinion in *DeRolph III* to allow the exclusion of the top and bottom 5 percent of school districts in the calculation of per-pupil base costs as required by H.B. 94.

C
Effective Date of Formula Changes

{¶68} Our order in *DeRolph III* required that changes to the foundation formula be applied retroactively to July 1, 2001. 93 Ohio St.3d at 324, 754 N.E.2d 1184. The state argues that this aspect of our decision "contrasts sharply with the Court's prior decisions in this case and the practical considerations they recognize, as well as other precedent under the Ohio Constitution."

{¶69} We are now well into the second year of the financial biennium that began on July 1, 2001. The state contends that any changes to the foundation formula ordered by this court will require time to implement and that economic circumstances have changed in the state since *DeRolph III* was announced. I agree that the effective date prescribed by *DeRolph III* is no longer realistic. Moreover, the further July 1, 2001, recedes into the past, the more likely it is that retroactive application of *DeRolph III* to that date would result in a one-time infusion of additional funds unconnected to the current budgets of school districts.

{¶70} Upon reconsideration, I believe that the changes to the school foundation formula ordered in *DeRolph III*, modified as stated herein, should be implemented effective July 1, 2003, and applied to the subsequent years designated in R.C. 3317.012(A)(1).

D
Summary

{¶71} I would hold that wealth screening of school districts as mandated by H.B. 94 may be used in determining per-pupil base cost for purposes of the school foundation formula. I would also reaffirm our decision in *DeRolph III* that the state, having elected to retain a foundation program based on the average spending of selected districts, must determine that base cost by using only those school districts meeting the performance standards set by R.C. 3317.012(B)(1)(a) through (aa) without rounding to include additional lower-spending districts and without adjusting for the echo effect, effective July 1, 2003. Cf. *DeRolph III*, 93 Ohio St.3d at 324-325, 754 N.E.2d 1184.

{¶72} Our decision in *DeRolph III* should otherwise be reaffirmed, including our holding that the parity aid program established by the General Assembly must be fully funded not later than July 1, 2003. Id. at 325, 754 N.E.2d 1184.

COOK, J., Dissenting.

{¶73} For the reasons I have expressed throughout this court's consideration of this cause, the court should dismiss this case. See *DeRolph v. State* (2001), 93 Ohio St.3d 309, 380-383, 754 N.E.2d 1184 (Cook, J., dissenting).

Bricker & Eckler, L.L.P., Nicholas A. Pittner, John F. Birath Jr., Sue W. Yount, Quintin F. Lindsmith and Susan B. Greenberger, for appellees.

Betty D. Montgomery, Attorney General, Mary Lynn Readey, Roger F. Carroll and James G. Tassie, Assistant Attorneys General, for appellants.

APPENDIX D

THE SUPREME COURT OF OHIO

Case No. 99-570

Filed Dec. 11, 2002

Dale R. DeRolph, Parent and Next Friend of Nathan DeRolph, et al., Appellees,	)
v.	)
State of Ohio et al., Appellants.	)

Appeal from the Court of Common Pleas

JUDGMENT ENTRY

This cause is before the Court upon appellants' motion for reconsideration. Upon further consideration thereof,

IT IS ORDERED by the Court that, consistent with the opinion rendered herein, the decision entered in this case on September 6, 2001 be, and hereby is, vacated and that this Court's decisions in DeRolph v. State (1997) 78 Ohio St.3d 193, 677 N.E.2d 733, and DeRolph v. State (2000) 89 Ohio

St.3d 1, 728 N.E.2d 993, are the law of the case and that the current school-funding system is unconstitutional.

It is further ordered that the appellees recover from the appellants their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Perry County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Common Pleas for Perry County for entry.

COSTS:

Docket Fee, $40.00, paid by Attorney General of Ohio.

(Perry County Court of Common Pleas; No. 22043)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX E

THE SUPREME COURT OF OHIO

Case No. 99-570

Filed Dec. 11, 2002

Dale R. DeRolph, Parent and Next Friend of Nathan DeRolph, et al., Appellees,	)
v.	)
State of Ohio et al., Appellants.	)

MANDATE

To the Court of Common Pleas

Within and for the County of Perry, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

IT IS ORDERED by the Court that, consistent with the opinion rendered herein, the decision entered in this case on

September 6, 2001 be, and hereby is, vacated and that this Court's decisions in DeRolph v. State (1997) 78 Ohio St.3d 193, 677 N.E.2d 733, and DeRolph v. State (2000) 89 Ohio St.3d 1, 728 N.E.2d 993, are the law of the case and that the current school-funding system is unconstitutional.

COSTS:

Docket Fee, $40.00, paid by Attorney General of Ohio.

(Perry County Court of Common Pleas; No. 22043)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX F

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Sec. 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

CONSTITUTION OF THE STATE OF OHIO

ARTICLE VI: EDUCATION

§ 2 School funds.

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

APPENDIX H

IN THE SUPREME COURT OF OHIO

Case No. 03-0447

Filed March 10, 2003

ORIGINAL ACTION FOR WRIT OF PROHIBITION

STATE, EX REL. STATE OF OHIO	)
Relator,	)
v.	)
THE HONORABLE JUDGE LINTON D. LEWIS, JR., *et al.*	)
Respondents.	)

ANSWER OF RESPONDENTS-INTERVENORS, THE *DeROLPH* PLAINTIFFS AND THE OHIO COALITION FOR EQUITY & ADEQUACY OF SCHOOL FUNDING

For their Answer to the Complaint, Respondents-Intervenors, the Plaintiffs in *DeRolph v. Ohio* (July 1, 1994), Perry C.P. No. 22043, unreported (hereinafter "*DeRolph* Plaintiffs")[1] and the Ohio Coalition for Equity & Adequacy of School Funding ("Coalition"), admit, deny and aver as follows:

FIRST DEFENSE

1. In response to paragraph #1 of the Complaint, the *DeRolph* Plaintiffs and the Coalition state that Relator, State of Ohio, was a defendant in the lawsuit *DeRolph v. State*, filed in the Perry County Court of Common Pleas, Original Case No. 22043, Ohio Supreme Court Case Nos. 95-2066 and 99-570. The *DeRolph* Plaintiffs and the Coalition deny the remaining allegations of paragraph #1 of the Complaint.

2. In response to paragraph #2 of the Complaint, the *DeRolph* Plaintiffs and the Coalition admit that Respondents include the Honorable Linton D. Lewis, Jr., the Common Pleas Court Judge of Perry County, Ohio, and the Common Pleas Court of Perry County. The *DeRolph* Plaintiffs and the Coalition state that the law regarding jurisdiction of a common pleas court speaks for itself. The *DeRolph* Plaintiffs and the Coalition deny each and every other allegation of paragraph #2 of the Complaint.

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[1] The *DeRolph* Plaintiffs are identified with particularity in Plaintiffs' First Amended Complaint, attached as Exhibit C to Plaintiffs' Motion for Compliance Conference, Exhibit F to Relator's Complaint.

3. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #3 of the Complaint.

4. In response to paragraph #4 of the Complaint, the *DeRolph* Plaintiffs and the Coalition state that on or about December 19, 1991, Dale DeRolph and other plaintiffs filed a lawsuit for declaratory and injunctive relief in the Perry County Court of Common Pleas alleging that Ohio's public elementary and secondary school funding system was unconstitutional on several grounds, including that the system violated the thorough and efficient clause of Section 2, Article VI of the Ohio Constitution. The *DeRolph* Plaintiffs and the Coalition deny any remaining allegations of paragraph #4 of the Complaint.

5. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #5 of the Complaint.

6. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #6 of the Complaint.

7. The *DeRolph* Plaintiffs and the Coalition admit that on May 11, 2000, the Ohio Supreme Court held that the State's system of school funding was still unconstitutional in *DeRolph v. State* (2000), 89 Ohio St. 3d 1 (*DeRolph II*), but deny that there had been restructuring of the system. The *DeRolph* Plaintiffs and the Coalition admit the remaining allegations of paragraph #7 of the Complaint.

8. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #8 of the Complaint.

9. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #9 of the Complaint.

10. In response to paragraph #10 of the Complaint, the *DeRolph* Plaintiffs and the Coalition admit that the Supreme Court did not retain jurisdiction. The *DeRolph* Plaintiffs and the Coalition deny the remaining allegations of paragraph #10 of the Complaint.

11. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #11 of the Complaint.

12. The *DeRolph* Plaintiffs and the Coalition deny the allegations of paragraph #12 of the Complaint.

SECOND DEFENSE

13. The admissions, denials, and averments of paragraphs #1 through #12 of this Answer are incorporated by reference as if fully set forth herein.

14. The *DeRolph* Plaintiffs and the Coalition deny the allegations of paragraph #14 of the Complaint.

15. The *DeRolph* Plaintiffs and the Coalition deny the allegations of paragraph #15 of the Complaint.

THIRD DEFENSE

16. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

17. The Complaint fails to state a claim upon which relief may be granted.

FOURTH DEFENSE

18. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

19. The Complaint seeks an order of this Court which would, if granted, represent an unwarranted infringement on the constitutional and statutory rights and responsibilities of Respondents Perry County Common Pleas Court and Judge of that Court because the Respondents are a court of general jurisdiction with subject matter jurisdiction over *DeRolph v. State* for the purpose of issuing remedial orders consistent with the orders of this Court.

FIFTH DEFENSE

20. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

21. Respondent, as an Ohio Common Pleas Court, does not "patently and unambiguously" lack jurisdiction to consider the Motion For Compliance Conference submitted by the *DeRolph* Plaintiffs. Respondent has the right to determine, in the first instance, whether it has that jurisdiction and whether that jurisdiction should be exercised as requested in the Motion. Relator has an adequate remedy at law by way

of appeal from any appealable orders that might be issued by Respondent.

SIXTH DEFENSE

22. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

23. Relator has failed to plead sufficient facts to demonstrate, and in fact cannot establish, that the Motion For Compliance Conference, if granted, would result in harm to Relator sufficient to warrant relief from this Court.

SEVENTH DEFENSE

24. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

25. Divesting the Trial Court of the authority to provide a remedy for the constitutional wrongs declared in *DeRolph v. State* (2002), 97 Ohio St.3d 434 (*DeRolph IV*) would violate the substantive due process rights of the *DeRolph* Plaintiffs and Ohio's public school children in contravention of the United States and Ohio Constitutions.

SEVENTH DEFENSE

26. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions,

denials and averments in this Answer as if fully set forth herein.

27. Relator, the Ohio Attorney General, is estopped from asserting the claims in the Complaint by the oath or affirmation he was required to take before entering upon his duties, which oath or affirmation was to support the Constitution of the United States and this state. See, Section 7, Article XV of the Ohio Constitution. The relief sought in the Complaint would perpetuate the continuing violation of constitutional rights of *DeRolph* Plaintiffs and Ohio's public school children.

WHEREFORE, the *DeRolph* Plaintiffs and the Coalition having answered the Relator's Complaint in this matter, respectfully request this Court to dismiss this action at Relator's costs.

Respectfully submitted,
/s/_____

Nicholas A. Pittner (0023159)
Counsel of Record
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
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Telephone: (614) 227-2300
Facsimile: (614) 227-2390

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer of Respondents-Intervenors, the *DeRolph* Plaintiffs and the Ohio Coalition for Equity & Adequacy of School Funding, has been served upon Roger F. Carroll, Counsel of Record, Assistant Attorney General, 30 East Board Street, 16th Floor, Columbus, Ohio 43215-3428, via regular U.S. Mail postage prepaid, this _____ day of March, 2003.

/s/_____
Sue W. Yount

APPENDIX I

IN THE COMMON PLEAS COURT,
PERRY COUNTY, OHIO

Original Case No. 22043

Ohio Supreme Court
Case No. 99-570

Filed March 4, 2003

DALE R. DeROLPH, *et al.*,

Plaintiffs,

v.

STATE OF OHIO, *et al.*,

Defendants.

Judge Linton D. Lewis, Jr.

PLAINTIFFS' MOTION FOR COMPLIANCE CONFERENCE

Plaintiff's Motion for Compliance Conference and Memorandum in Support

Pursuant to this Court's 1999 Order requiring Defendants to forthwith prepare a report setting forth proposals for complying with the Court's judgment therein, and pursuant to the directives and mandate of the Ohio Supreme Court, Plaintiffs hereby move this Court to schedule and conduct a conference to address Defendants' compliance with the orders of this Court and the Ohio Supreme Court. The reasons for this Motion are set forth in the attached Memorandum in Support.

/s/_____

Nicholas A. Pittner (0023159)
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
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MEMORANDUM IN SUPPORT

Introduction

"No man is above the law and no man below it: nor do we ask any man's permission when we ask him to obey it."

— Theodore Roosevelt

Before the bench, all parties stand as equals. The State of Ohio is subject to the law no less than the most common of our citizens. Today, Plaintiffs and the 1.8 million Ohio schoolchildren affected by the rulings in this case ask the Court to begin the process of overseeing the development of the school funding system to which they are entitled under the law.

In response to the State's Motion for Reconsideration of *DeRolph v. State* (2001), 93 Ohio St.3d 309, 754 N.E.2d 1184 (*"DeRolph III"*), the Supreme Court issued a decision on December 11, 2002, vacating its prior holding in *DeRolph III* and reinstating as the law of the case its prior decisions in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 (*"DeRolph I"*) and *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 (*"DeRolph II"*). *DeRolph v. State* (2002), 97 Ohio St.3d 434, 2002-Ohio-6750 (*"DeRolph IV"*). The Supreme Court's ruling established beyond question that *"[D]eRolph I* and *DeRolph II* are the law of the case and the current school funding system is unconstitutional." *Id.* at 435.

In reaching that decision, the Court recognized the intent of the framers to impose binding obligations on the General Assembly.

> Otway Curry, a delegate from Union County, expressed his concern that the Thorough and Efficient Clause would "prove totally insufficient and powerless." *Were this court to avoid its responsibility to give continued meaning to the Constitution, his fears would become reality.*
>
> The Constitution of this state is the bedrock of our society. It expressly directs the General Assembly to secure a thorough and efficient system of common schools, and it does so expressly because the legislature of the mid-nineteenth century would not.

Id. at 436 (Internal citation omitted). (Emphasis added.) The Court specifically directed the result that must now be attained.

> [T]he General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding system that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

Id. at 435 (Internal citation omitted).

The Supreme Court did not retain jurisdiction of the case nor did it issue specific orders for further proceedings. The Court did, however, direct this Court, by judgment entry and mandate, both issued on December 11, 2002, to "proceed without delay to carry [the Supreme Court's] judgment in this cause into execution." *DeRolph v. State* (December 11, 2002), Case No. 99-570 (mandate of the Ohio Supreme Court, *DeRolph v. State,* 97 Ohio St.3d 434). (*Exhibits A* and *B*, attached.) Plaintiffs now move this Court to schedule and conduct a compliance conference to consider the State's plan for compliance with the orders of the Supreme Court, as well as with the remedial orders previously issued by this Court and stayed during the pendency of the appeal to the Supreme Court.

Because Plaintiffs' Amended Complaint in this case set forth valid claims for both a declaratory judgment *and* injunctive relief pursuant to that declaration, this Court has always had jurisdiction to address the latter, except during the pendency of the appeal. *DeRolph v. Ohio,* Case No. 22043 (First Amended Complaint for Declaratory and Injunctive Relief). (*Exhibit C*, attached.) With the declaratory judgment portion of this case conclusively ended by *DeRolph IV*, it is now time for this Court to proceed to secure the implementation of a remedy. The Court has both the right and responsibility to do so.

In this Court's initial *DeRolph* decision, issued July 1, 1994, and in its decision of February 26, 1999, the Court recognized the necessity for remedial orders and issued orders appropriate to the unique nature of this case. *DeRolph v. Ohio* (July 1, 1994), Perry C.P. No. 22043, unreported;

DeRolph v. State (1999), 98 Ohio Misc. 2d 1, 712 N.E.2d 125. In the latter decision, after ruling that the State had failed to comply with the Supreme Court's *DeRolph I* mandates, the Court issued the following direction to Defendants:

> It is this Court's desire to retain jurisdiction for a period of time to assure that this Order is followed and steps are being taken to resolve the matters involved in the case at bar. Therefore, the Superintendent of Public Instruction for the State of Ohio and the State Board of Education are required to forthwith prepare a report setting forth proposals for complying with the Order of this Court and the directives of the Ohio Supreme Court. The same shall be presented to the Legislature upon completion. Thereafter, the State Superintendent and the State Board of Education shall forthwith prepare a report after the legislative session for calendar year 1999 setting forth the steps taken to resolve the issues in the case at bar.

DeRolph v. State, 98 Ohio Misc.2d at 263. The Court's orders (hereafter, the "1999 orders") were clearly designed to require the State to begin the development of a constitutional funding system while not unduly encroaching upon the legislative process necessary to enact that system. The Court expressly retained jurisdiction to assure compliance with its 1999 orders, and it indicated that it would monitor the State's progress, "[u]pon a timely motion by either party or by a motion of this Court." *Id.* at 252.

The Court's 1999 orders were stayed pending the State's appeal to the Supreme Court. (*Exhibit D*, attached.) That stay expired on December 11, 2002, when the Supreme Court issued its *DeRolph IV* decision, a decision which confirmed this Court's declaration that the school funding system is unconstitutional. The Supreme Court has now relinquished its jurisdiction over this case. Consequently, jurisdiction has re-vested in this Court for remedial actions consistent with the decisions of the Supreme Court. The fact that no specific directions were given to this Court by the Supreme Court (other than the mandate to carry the Supreme Court's judgment into effect) is consistent with common law and statutory authority which require no such direction to enable trial courts to carry into execution the judgments of appellate courts.

This Court's 1999 remedial orders represent a reasonable approach to the difficult issue of judicial oversight of the legislative process. While Plaintiffs are not asking the Court to dictate the content of remedial legislation, the Court also cannot permit the continued denial of Plaintiffs' right to a constitutionally compliant system of public education. Judicial monitoring and oversight are essential if such a system is to be developed in Ohio. Indeed, it is more critical today than it was in 1999 that the Court fulfill this role, since without oversight by this Court, it is apparent that Plaintiffs will continue to be denied their constitutional right to a thorough and efficient system of public education. [1]

[1] Public pronouncements of Defendants and Governor Taft since the Supreme Court's *DeRolph IV* decision make it clear that Defendants mistakenly believe that because the Supreme Court did not retain

I. This Court Has Continuing Jurisdiction To Enforce The Supreme Court's *DeRolph IV* Decision.

This Court derives its authority from the Ohio Constitution and laws enacted in furtherance of the constitutional grant of judicial power. In particular, Section 4 of Article IV includes the grant of original jurisdiction to common pleas courts over "[a]ll justiciable matters *** as may be provided by law."

This case was initially brought as an action for both declaratory and injunctive relief pursuant to R.C. Chapter 2721. The law is well established that a common pleas court may not only declare the rights of the parties in a declaratory judgment action brought under R.C. Chapter 2721, but it also may order injunctive relief consistent with the rights so declared. Although R.C. 2721.09 authorizes the filing of additional pleadings seeking further relief following a judicial declaration of rights, additional pleadings are not required where, as in this case, the initial complaint included claims for injunctive relief. *Peltz v. City of South Euclid* (1967), 11 Ohio St.2d 128, 40 O.O.2d 129, 228 N.E.2d 320 (permanently enjoining the enforcement of an ordinance "to the extent of its constitutional infirmity"); *American Life & Acc. Ins. Co. of Ky. v. Jones* (1949), 152 Ohio St. 287, 40

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jurisdiction of this case, they are under no obligation to take any action to comply with *DeRolph IV*. But it is fundamental that orders of the Supreme Court directed to the Defendants are binding on them and, as demonstrated herein, are enforceable in this Court. Additional direction from the Supreme Court to this Court was unnecessary.

O.O. 326, 89 N.E.2d 301 (interpreting G.C. 12102-8, predecessor to R.C. 2721.09, as providing authority to grant any further necessary or proper relief following an entry of declaratory judgment); *Clermont County ADAMH Boards v. Hogan et al.* (1995), 1995 Ohio App. LEXIS 4795, *aff'd in part, rev'd in part* on other grounds, (1997), 79 Ohio St.3d 358, 1997 Ohio 31, 681 N.E.2d 1322, citing *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 62, 409 N.E.2d 258 ("[a] trial court has continuing authority under R.C.2721.09 and its general equity powers to fashion any remedy necessary to assure the enforcement of its decree"). Accord *McCann v. Kerner et al.* (C.A.7, 1971), 436 F.2d 1342 ("[Section 2202, Title 28, U.S. Code, the federal analog to R.C. 2721.09] contemplates that subsequent to the issuance of a declaratory judgment [holding a state statute unconstitutional], a court may upon notice and hearing grant injunctive relief to protect and enforce its judgment"); *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.* (C.A.2, 1958), 253 F.2d 29 ("[t]here was ample residual power in the court to issue this permanent injunction [under Section 2202, Title 28, U.S. Code], even though the original decree contained no such provision"). Thus, it is within the general equity powers of this Court to fashion any remedial orders necessary to the enforcement of its decree.

This Court's 1999 orders were remedial in nature and issued pursuant to the Court's declaration that Ohio's school funding system was unconstitutional, a declaration consistent with the Ohio Supreme Court's *DeRolph I* decision and since

confirmed by the subsequent decisions of that court.[2] Had there been no appeal of the 1999 decision and orders, there would be no question that the Court not only had jurisdiction to enforce those orders, but also that the Court expressly retained that jurisdiction for the purpose of enforcement. See *Horn & Hardart Co. v. National RR. Passenger Corp.* (D.C. 1987), 659 F.Supp. 1258, *aff'd*, (C.A.D.C. 1988), 843 F.2d 546 ("it would be incongruous for district courts to have the absolute right to hear petitions for further relief when no appeal is lodged but no right after an appeal unless expressly granted by an appellate court").

The intervening appeal to the Ohio Supreme Court stayed, but did not diminish in any way, this Court's inherent authority to enforce the remedial 1999 orders. To the contrary, the intervening decisions of the Supreme Court in *DeRolph II* and *DeRolph IV* have clearly established, as the law of this case, the unconstitutionality of Ohio's school funding system and the requirement of comprehensive reform. The declaratory judgment portion of this case is now concluded, but this Court remains vested with the authority to enforce the development and implementation of a remedy.

II. The Supreme Court's Mandate In *DeRolph IV* Must Be Enforced By This Court.

Separate and apart from the foregoing grounds for monitoring compliance, this Court is obliged to comply with the Supreme Court's mandate to "proceed without delay to

[2] Of course, the passage of time has made the compliance dates obsolete and an updated compliance schedule is now appropriate.

carry [the Supreme Court's] judgment in this cause into execution." *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*) The Supreme Court's mandate provides independent authority for the Court's monitoring and oversight of the State's progress in remedying that which has been declared unconstitutional. See *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675, 588 N.E.2d 176, 178, citing 5B Corpus Juris Secundum (1958) 529, Appeal and Error, Section 1958 ("The mandate of the appellate court is the order directing the action to be taken or disposition to be made of the cause by the lower court, returning the proceedings to the lower court, *and reinvesting it with jurisdiction thereof*"). (Emphasis added.)

The Ohio Revised Code broadly empowers the Supreme Court to send its judgments to the court below "for specific or general execution, or to the inferior courts for further proceedings." R.C. 2503.44. Moreover, R.C. 2505.39 provides as follows:

> A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings. *The court to which such mandate is sent shall proceed as if the final order, judgment, or decree had been rendered in it.*

R.C. 2505.39. (Emphasis added.)

Accordingly, the Court must proceed as if the judgment in *DeRolph IV* had been rendered in this Court. See *Cleveland Elec. Illuminating Co. v. Public Util. Comm. of Ohio* (1976), 46 Ohio St.2d 105, 110, 346 N.E.2d 778, 782, citing *Carey v. Kemper* (1887), 45 Ohio St. 93, 11 N.E. 130 ("The judgment is given legal effect when it is executed by the lower tribunal, and the judgment as rendered is that of the tribunal to which the cause had been remanded").[3] See, also, *Hunt v. Westlake City School Dist. Bd. of Edn.* (1996), 114 Ohio App.3d 563, 568, 683 N.E.2d 803, 807 (holding that a special mandate to the court of common pleas to carry a judgment into execution affords jurisdiction to enforce the judgment of the appellate court). The judgment that has been entered herein is that Ohio's system of school funding is unconstitutional, and the Court thus has the authority to require that appropriate plans are in place to accomplish the "complete systematic overhaul" required by *DeRolph I*, *DeRolph II*, and *DeRolph IV*. *DeRolph v. State*, 97 Ohio St.3d at 435.

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[3] The absence of the term "remand" in *DeRolph IV* has no bearing on this Court's authority to enforce the judgment. In *DeRolph I*, the Supreme Court used the term in connection with its establishment of a unique protocol, involving a stay of the Supreme Court's judgment, a further hearing on the merits in this Court, and a subsequent direct appeal to the Supreme Court. By comparison, at this juncture, no special instructions from the Supreme Court are necessary or appropriate. The unconstitutionality of the school funding system has been conclusively determined by the Supreme Court, no stay was issued, and the judgment is presently effective and enforceable. The Mandate expressly directs this Court to execute that judgment, and the Court now has the duty to use its inherent enforcement authority to do so.

The Court not only has the authority – that is, jurisdiction – to enforce a remedy; it also has a *duty* to do so. When a mandate from a superior court to an inferior court is presented, the inferior court has no discretion to obey or refuse, but must proceed in accordance with the mandate. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 462 N.E.2d 410. See, also, *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343, 345 ("A lower court has no discretion, absent extraordinary circumstances, to disregard the mandate of a superior court in a prior appeal in the same case"); Ohio Jurisprudence 3d (1979, Supp.2002), Appellate Review, Section 616. Consequently, this Court has no discretion but to "proceed without delay" to carry the Supreme Court's judgment into execution. *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*)

This Court's inherent authority to enforce a remedy thus derives additional vitality from the Supreme Court's mandate, which expressly requires the Court to carry the judgment into execution. As the judgment itself declares the current school funding system unconstitutional, the mandate necessarily embraces the authority of this Court to oversee the State's progress toward remedying the underlying constitutional infirmities. See *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675 ("We agree that the trial court may not alter or disobey the mandate from an appellate court. We do not agree that the trial court may not take additional action in the case not specifically authorized by the mandate").

As the Supreme Court made clear in *DeRolph IV*, "the General Assembly has not focused on the core constitutional directive of *DeRolph I*: 'a complete systematic overhaul' of the school funding system." *DeRolph v. State*, 97 Ohio St.3d at 435, citing *DeRolph v. State*, 78 Ohio St.3d at 212. It is therefore both necessary and appropriate at this time for the Court to exercise its jurisdiction to require the State to articulate its plan of action for remedying what the Supreme Court has deemed – in no uncertain terms – to be an unconstitutional system of school funding.

III. Without The Oversight Of This Court, Plaintiffs Will Be Denied a Remedy.

Throughout the twelve-year history of this case, the State has steadfastly refused meaningful steps toward compliance with the directives of the courts. Since July 1, 1994, there have been *two* decisions of this Court and *four* decisions of the Ohio Supreme Court, all holding that Ohio does not have a constitutional school funding system. Most recently, the Supreme Court in *DeRolph IV* ruled unequivocally that the current funding system "*is unconstitutional.*" *DeRolph v. State*, 97 Ohio St.3d at 435.

It is a longstanding theorem of jurisprudence that "an unconstitutional act is not a law, but a nullity." *Thomas v. State ex rel. Gilbert* (1907), 76 Ohio St. 341, 361, 81 N.E. 437, 439. Accordingly, the former statutory framework for the distribution of state funds for public education *no longer exists*, having been declared unconstitutional, with finality, in *DeRolph IV*. In these circumstances, Plaintiffs not only continue to suffer under an indisputably unconstitutional

system of public education, but they also now are at risk of not having *any* system of public education. Unlike the Supreme Court's previous declarations of unconstitutionality, this one contained *no stay of execution*, and, consistent with the absence of a stay, the mandate to this Court has directed the Court "to proceed without delay to carry the [Supreme Court's] judgment in this cause into execution." *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*)

The State's cavalier disregard of the Supreme Court's decisions – together with its seeming lack of concern for the impending collapse of the system of public education in Ohio – underscores the fact that, without judicial oversight, no remedy will be forthcoming in this case. Unbelievably, rather than commencing a good faith effort to comply with the orders of the Supreme Court, the State is now considering *cutting* the already-inadequate funds for education and seeking to balance the State's budget on the backs of its school districts.

This Motion does not ask the Court to intrude into the legislative process. But fundamental principles of jurisprudence establish both the right and the obligation of the judiciary to serve as the guardian of constitutional rights. As the Supreme Court has cautioned, judicial abdication in the face of legislative resistance would result in the judiciary becoming a "[w]illing participant in divesting the courts of judicial power and a coconspirator in the abdication of fundamental individual rights and liberties contained in our Constitution." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 501, 715 N.E.2d

1062, 1102. Moreover, as that court confirmed in *DeRolph II*, it is not sufficient for the judiciary merely to declare constitutional rights without also ensuring that remedial action ensues.

> [W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If did not, then the power to find a particular act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy.

DeRolph v. State, 89 Ohio St.3d at 12. (Emphasis in original.)

In the present case, as the Supreme Court warned in *DeRolph II*, the now-final declaration of Plaintiffs' rights will be a nullity without orders reasonably designed to bring about enforcement of those rights. This Court has already issued such orders, recognizing judicial monitoring as essential to assure compliance. Today, all Plaintiffs ask is that the Court begin the monitoring process by convening a conference and requiring the State to advise the Court and Plaintiffs as to when and how it intends to comply with *DeRolph IV* and the 1999 orders of this Court. This is an exceedingly modest request, especially in light of the fulsome scope of the remedy to which Plaintiffs are entitled. And given the *absolute obligation* of the State to comply with the directives of the

Supreme Court, it is a request that adds little, if anything, to the obligations already borne by the State. Otherwise stated, this is hardly a burdensome request; to the extent that the State intends in good faith to respond to *DeRolph IV*, there is no reason for the State to oppose it.

Should the Court decline, however, there is little doubt that the concerns of Delegate Curry – that the constitutional guarantee of a thorough and efficient system of public education could become "totally inefficient and powerless" – will be realized. *DeRolph v. State*, 97 Ohio St.3d at 436. Our Constitution will be rendered a meaningless historical document and our judicial system a mere "paper tiger." The twelve years spent litigating the rights of Ohio's school children will amount to little more than an academic exercise if, at the end, the State is free to disregard the consequent declarations of rights by the highest court of the state.

It now falls to this Court to determine whether the rule of law has meaning – for Plaintiffs and Ohio's 1.8 million public school pupils, as well as for future plaintiffs seeking declaratory judgments against the State. In the process, the Court will also signal whether those charged with making and enforcing the laws of Ohio must live within the constitution or are free to ignore it with impunity.

Conclusion

This matter is now before the Court pursuant to the Court's jurisdiction to enforce both its own prior Orders and those of the Supreme Court. Plaintiffs ask the Court to commence its exercise of its enforcement authority by

scheduling a compliance conference at the earliest possible time, in order to ensure that the State initiates, without further delay, the process of formulating a school funding system that satisfies the mandates of the Supreme Court.

Respectfully submitted,

/s/_____
Nicholas A. Pittner (0023159)
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
Quintin F. Lindsmith (0018327)
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Telephone: (614) 227-2300
Facsimile: (614) 227-2390
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Motion For Compliance Conference has been sent by regular U.S. Mail, postage prepaid, on this _____ day of March, 2003, to Roger F. Carroll, Assistant Attorney General, Office of the Attorney General of the State of Ohio, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215-3428.

/s/_____
Nicholas A. Pittner

*** Exhibits A through D attached to this motion have not been included for purposes of this appendix.

APPENDIX J

**IN THE COMMON PLEAS COURT,
PERRY COUNTY, OHIO**

Case No. 22043

Filed July 1, 1994

DALE R. DeROLPH, Parent and Next Friend of NATHAN DeROLPH, et al.,	)
PLAINTIFFS	)
v.	)
STATE OF OHIO, et al.,	)
DEFENDANTS.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND MEMORANDUM

*** This document has been excerpted for purposes of this appendix. Only the relevant portion of the document is reproduced.

V. THE COURT HEREBY ORDERS AND DECLARES:

1. The responsibility to afford school children the Constitutional right to receive the benefits of a thorough and efficient system of public schools devolves upon the General Assembly by the force of the Constitution's command, and not upon the school districts, which are creatures of the General Assembly.

2. Since the duty to make provision for a thorough and efficient system is the State's duty, the failure of the Plaintiff school districts to carry out that function is a failure of the State to carry out the commands of the Ohio Constitution in violation of Section 2 of Article VI and Section 26 of Article II.

3. The State may not constitutionally delegate the responsibility for financing education to the school districts.

4. Public education is a fundamental right in the State of Ohio, guaranteed by the Constitution of the State of Ohio.

5. The current system of funding public elementary and secondary education is unconstitutional as applied to plaintiffs and others. The specific provisions included within this determination are:

a. R.C. § 133.301--Additional borrowing authority of school districts. This provision, to the extent

that it is utilized to require school districts to borrow funds from private lenders to pay obligations that are, in fact, obligations of the State, represents a violation of §§ 1 and 3 of Article VIII, as well as § 4 of Article XII, which requires the State to raise sufficient revenue to pay its expenses.

b. R.C. § 319.301--Calculation of tax reduction percentages for carryover property in each class. This statute directly contributes to the harm complained of in this action. The limitations of this section far exceed the tax reduction requirements of § 2a of Article XII of the Ohio Constitution. The excessive reliance on local property taxes as a means of funding education in Ohio directly contributes to the harm inflicted on the Plaintiffs in this case.

c. R.C. §§3313.483, 3313.487, 3313.488, 3313.4810 and 3313.4811--Collectively, the emergency school assistance loan provisions. These statutes not only contribute to the Constitutional deprivations complained of, they also represent a violation of 1 and 3 of Article VIII, as well as § 4 of Article XII, which requires the State to raise sufficient revenue to pay its expenses.

d. Various provisions of R.C. Chapter 3317:
§ 3317.01--School foundation program; eligibility; administration of funds; § 3317.02--Definitions;

equalization factors (foundation program); § 3317.022--Computation of state aid distribution by districts; § 3317.023--Adjustments to basic state aid; § 3317.024--Distribution of moneys appropriated for specific programs; § 3317.04--Minimum amounts of payments to districts; and § 3317.13--Salary schedule and job classification for teachers. These statutes individually and together operate to deprive Ohio's school children of an equal opportunity to a high quality education as mandated by the Constitution and Ohio statutes. The entire school foundation program as it is currently enacted and applied is unconstitutional. School children, both handicapped and non-handicapped, are denied an adequate education because of the funding system in place.

e. R.C. Chapter 3318--Classroom Facilities Act. This chapter contributes to the constitutional deprivations demonstrated in this case, not because of the funds provided under the act but because of the extent to which the legislature has failed to provide sufficient funds to serve the facilities needs of Ohio's public schools.

f. R.C. §§ 3317.05, 3317.051 and 3317.052--Unit funding for mandated programs. These provisions are unconstitutional in that the State has mandated programs and services for both handicapped and vocational pupils, but funded those programs in such a fashion as to cause substantial inequity among the pupils receiving these programs and

dilution of funds available for the education of other pupils. Handicapped children are denied the equal protection of the Ohio Constitution with respect to the provision of a free appropriate education that meets the requirements of federal and state provisions.

6. That the Defendant State of Ohio is directed forthwith to provide for and fund a system of funding public elementary and secondary education in compliance with the Ohio Constitution.

7. A Constitutionally acceptable system of school funding must:

a. Recognize that the State has ultimate responsibility for the establishment, organization, and maintenance of the system of public schools in the State.

b. Ensure that the State provide for a thorough and efficient system of public schools throughout the geographic area of the State. Such a system would include facilities in good repair and supplies, materials and funds necessary to maintain these facilities in a safe manner applicable with all local, state, and federal requirements.

c. Provide to all school children throughout the State, including handicapped children, regardless of where they live, free schools on an equal basis, which includes equitable and adequate educational

opportunities, educational materials, equipment and supplies to all children. Adequate educational opportunities shall consist of the following:

1. Sufficient oral and written communication skills to function socially and economically in Ohio and globally;

2. Sufficient mathematic and scientific skills to function as a contributing citizen to the economy of Ohio and globally;

3. Sufficient knowledge of economic, social and political systems, generally, and of the history, policies, and social structure of Ohio and the nation and enable the student to make informed decisions;

4. Sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;

5. Sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;

6. Sufficient understanding of the arts to enable each student to appreciate his or her

cultural heritage and the cultural heritages of others;

7. Sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life intelligently;

8. Sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Ohio, in surrounding states, across the nation, and throughout the world, in academics or in the job market;

9. Sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full potential;

10. Sufficient facilities, equipment, supplies and instruction to enable both female and male students to compete equally within their own schools as well as schools across the State of Ohio and worldwide in both academic and extracurricular activities;

11. Sufficient monitoring by the General Assembly to assure that this State's common schools are being operated

without there being mismanagement, waste or misuse of funds; and

12. Sufficient facilities for each school district across the State that are adequate for instruction, safe, sanitary and conducive to providing a proper education as outlined by the above-related criteria.

8. The Superintendent of Public Instruction and the State Board of Education shall forthwith prepare a report setting forth proposals for the elimination of wealth based disparities among the school districts within the State of Ohio. Said report shall be presented to the Ohio Legislature upon completion.

9. The Superintendent of Public Instruction and the State Board of Education shall forthwith prepare a report after the legislative sessions are completed for calendar year 1994 and 1995 setting forth the steps being taken to eliminate the wealth based disparities among the school districts within the State of Ohio. The report shall state what action has been taken and what effect or anticipated effect such action will have on the school districts of this State.

10. The State Board of Education shall provide a summary of all proposals and reports required by this Order to the Superintendent and school board presidents of the Plaintiff School Districts as well as all school districts throughout this State.

11. This Court does not deem this case a proper one in which to retain ongoing jurisdiction. It is this Court's desire to retain jurisdiction for a period of time to assure this Order is followed and steps are being taken to resolve the matters involved in the case at bar. The progress of the State to resolve these issues shall be monitored upon a timely motion by either party or by a motion of this Court.

12. The Plaintiffs are awarded costs in this matter including reasonable attorneys fees.

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